Supreme Court, U.S.
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No. _____ 021167 JAN 30 2003

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In The
Supreme Court of the United States

VIRGINIA VERMICULITE, LLC,

Petitioner,

v.

THE HISTORIC GREEN SPRINGS, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED

1. Can an appellate court decide an issue in a civil case that has never been raised by a party in its appellate briefing, and if so what criteria, if any, constrains their power to do so?

2. Is a property or lease transfer coupled with a covenant not to compete immune from scrutiny under Sherman Act §1 because such covenants are imposed "unilaterally" by the original property owner or lessee?

PARTIES TO THE PROCEEDING

The petitioner in this case is Virginia Vermiculite, LCC, formerly Virginia Vermiculite, Ltd, which was the plaintiff in the district court and appellant before the U.S. Court of Appeals for the Fourth Circuit.

The respondent is Historic Green Springs, Inc., which was the defendant in the district court and appellee before the U.S. Court of Appeals for the Fourth Circuit.

W.R. Grace & Co.-Conn., was a defendant before the district court but entered into a settlement with VVL before the trial in district court, and is no longer party to this litigation.

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PETITION FOR WRIT OF CERTIORARI

Virginia Vermiculite, LLC (VVL), petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The court of appeals decision for which review is sought is reported at 307 F.3d 277. The district court's opinion granting summary judgment on some claims is reported at 108 F.Supp.2d 549. The district court's opinion granting judgment after a bench trial on the remaining claims is reported at 144 F.Supp.2d 558. Earlier opinions in the case, for which review is not sought, appear at 156 F.3d 535, 965 F.Supp. 802, 98 F.Supp.2d 729, 2000 WL 1456338 , and 2000 WL 1456454.

JURISDICTION

The court of appeals' judgment was entered Oct. 4, 2002. A timely petition for panel and en banc rehearing was filed, and it was denied on November 1, 2002. Pet. App. 255a-257a. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Sherman Act §1, 15 U.S.C. §1, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Federal Rule of Appellate Procedure 28(a)-(b) is set forth in the Appendix at 258a-259a.

STATEMENT OF THE CASE

This case involves an anticompetitive suppression of assets ingeniously disguised as a charitable donation. The trial court found a conspiracy but rejected the Sherman Act §1 claim on other grounds, which were appealed. Without reaching those appealed grounds, the appellate court *sua sponte* concluded that no conspiracy existed without any briefing on that issue.

Facts. The trial court found the following. W.R. Grace & Co. (Grace) and VVL are the only two firms in North America that mine and process vermiculite, a mineral that in the 1990s was commercially mined and processed in only two U.S. states, Virginia and South Carolina. 144 F.Supp.2d

at 562, 571.[1] "Grace perceived itself as 'dominat[ing] the North American market,' producing 72% ... of vermiculite consumed in North America," with VVL producing 14% (13% in Virginia and 1% in South Carolina), and a South African producer selling the remaining 13%. *Id.* at 566.

Because of its bulk, raw mined vermiculite is transported to processing plants located within 15 miles of the mine to extract vermiculite concentrate. *Id.* at 561. Grace mined and processed vermiculite only in South Carolina, but acquired (through purchase or lease) all but one parcel with usable vermiculite reserves in Virginia. *Id.* at 562-67. "Grace retained the properties for about twenty years without ever mining in Virginia. The reason Grace retained the [Virginia] reserves for twenty years without mining them, and yet continued to pay advanced mineral royalties, was to keep those reserves from its competitor, VVL." *Id.* at 566.

VVL had the only other Virginia parcel with usable vermiculite reserves, but was about to exhaust those reserves in the early 1990s. *Id.* at 565-67. In April 1991, VVL offered $1.75 million for Grace's Virginia reserves. *Id.* at 567-68. Grace responded based on the following internal analysis. Grace calculated it would never itself use the Virginia reserves because the capital costs of building a new processing facility could not be recouped. *Id.* at 567. Grace thus believed "the only benefit of retaining the reserves was to keep VVL from acquiring them." *Id.* Grace calculated it would gain a present value of $1.5 million in additional vermiculite profits over the next twenty years by preventing VVL from mining this land. *Id.* at 569, 573. Grace also calculated that continuing to hold the properties would incur carrying costs of $1-1.1 million. *Id.* at 567, 574. Thus, the net anticompetitive benefit of holding the reserves to

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[1]Prior to 1990, Grace also had operations in Montana that it had to shut down because they were unprofitable. *Id.* at 562, 567. In 1999, a start-up named Stansbury claimed to have discovered commercially viable reserves in Montana, but had yet to actually establish profitable operations. *Id.* at 588. Vermiculite has never been commercially mineable anywhere in the United States other than Virginia, South Carolina or Montana. *Id.* at 562.

suppress them was $400-500,000. Accordingly, when Grace analyzed VVL's offer without considering the possibility of transferring the properties to a third party with covenants that barred mining, Grace concluded it should sell to VVL rather than continue to hold the reserves unmined. *Id.* at 569.

But instead of pursuing those negotiations with VVL, Grace decided to pursue an ingenious scheme to permanently foreclose the reserves while eliminating its carrying costs, getting a tax deduction, and evading any antitrust duty to deal attached to holding the reserves. In September 1992, Grace agreed to donate its Virginia properties to Historic Green Springs, Inc. (HGSI), a nonprofit dedicated to preserving historic areas, coupled with restrictive covenants that barred HGSI from ever allowing the properties to be used to mine or transport vermiculite. *Id.* at 573-74, 579-80. "These covenants had the purpose of preventing VVL from mining the properties and from using the properties to transport its vermiculite ore." *Id.* at 579.

As the trial court summarized, for "two decades, Grace had a 'strategy' of holding its reserves solely to keep those reserves from its competitor. When Grace decided to reevaluate the viability of this strategy in the early 1990s, HGSI and Grace realized that their joint antipathy of VVL could work to their mutual benefit. Prior to the donations, both Grace and HGSI knew that VVL was depleting its reserves in [Virginia].... Grace perceived that the manner in which it disposed of its properties could influence VVL's 'ability to continue to operate'.... Grace calculated how much its vermiculite business would benefit from VVL closing in Virginia due to a lack of reserves, and how much VVL's vermiculite business would benefit if VVL obtained Grace's Virginia reserves.... The September 1992 meetings between Grace and HGSI marked the beginning of their agreement that their joint interests would be served by VVL running out of reserves in Virginia." *Id.* at 602.

Unlike normal conservation easements, the restrictive covenants agreed to by Grace and HGSI "prohibited mining

even if the land could be successfully restored." *Id.* at 582. Grace and HGSI also agreed to conditions prohibiting vermiculite mining or transportation even on commercial properties that were "not located in the Landmark District." *Id.* at 582. Finally, Grace and HGSI "replaced the general prohibition of any type of mining with a restriction that prohibited only the mining and transporting of vermiculite" on some land. *Id.* at 586-87. None of this could be explained by preservationist purposes. Indeed, HGSI asked for the last modification so HGSI could put the properties to "commercial/industrial use." *Id.* at 586, 604.

"None of Grace's objectives in making the donations was to further preservationist interests." *Id.* at 604. Grace's strategy was "solely to keep those reserves from its competitor." *Id.* at 602. HGSI knowingly helped Grace achieve this purpose. *Id.* at 602-03, 605. HGSI's President "knew it was not necessary for Grace to include restrictive covenants in order to donate to HGSI or to claim a tax deduction." *Id.* at 604. HGSI's President also "did not believe Grace was concerned about its standing among environmentalists." *Id.* at 582, 604.

HGSI's goal of preventing VVL from replenishing its depleting reserves was HGSI's "sole reason" for delaying one donation, and HGSI's "sole purpose" for assuming a lease. *Id.* at 603-04. This lease assumption could not be explained by "any preservationist or other potentially legitimate reason." *Id.* at 583, 591, 605. Likewise, for other properties "it is not plausible that . . . HGSI agreed to include restrictive covenants on those properties in furtherance of a preservationist purpose." *Id.* at 583, 603-04. "HGSI and Grace agreed to restrictive covenants on [certain] properties solely for the purpose of preventing VVL from using [them] for transportation purposes." *Id.* at 604. HGSI's President "Ms. Ely was not concerned about the industrial uses of those properties, and ... HGSI's and Grace's original intent in including the restrictive covenants on [these] properties was not to further preservationist interests, but simply to injure VVL in its business." *Id.*

Procedural History. After state court litigation succeeded in freeing some of these properties, *id.* at 583-87, VVL began this federal litigation to obtain damages and remedy the foreclosure of the remainder, alleging among other things that the Grace-HGSI agreement to donate the Virginia land and leases coupled with restrictive covenants constituted an agreement in restraint of trade under Sherman Act §1, a conspiracy to monopolize under Sherman Act §2, and a conspiracy to harm VVL's business under the Virginia Conspiracy Act. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1367.

The district court had initially held these allegations failed to state a claim against HGSI because the conspiracy could not have caused VVL's injury and HGSI enjoyed an antitrust exemption as a nonprofit motivated by sociopolitical objectives. 965 F.Supp. at 812-21, 828-29. The Fourth Circuit reversed, holding that the alleged donations coupled with restrictive covenants did state an antitrust conspiracy claim that caused VVL's injury and that no such exemption applies. 156 F.3d at 539-41.

On summary judgment, the district court found sufficient evidence of an antitrust conspiracy. 108 F. Supp. 2d at 563-70. But the district court issued summary judgment against the Sherman Act §1 claim because it ruled that full-scale rule of reason review applied and that VVL could not prove market power given the district court's exclusion of VVL's expert. 108 F. Supp. 2d at 570-84. Grace settled, and the §2 conspiracy to monopolize and Virginia Conspiracy Act claims proceeded to trial against HGSI. At trial, the trial court found that the evidence established an antitrust conspiracy between Grace and HGSI. *Id.* at 589-592. But the trial court held that the causal link between the conspiracy and VVL's injury could not be proven because Grace could have prevented mining or transportation through alternative means. *Id.* at 598-99, 610.

VVL appealed. It argued that causation had been proven under the proper legal standard. 261a, 269a-282a. VVL further argued that the district court erred both in failing to apply abbreviated rule of reason review to its Sherman Act

§1 claim given the lack of any procompetitive justification, and in not finding sufficient evidence of direct anticompetitive effects or market power under full scale rule of reason review. 269a, 282a-313a. HGSI filed briefs not only as appellee but as cross-appellant on various issues that the district court had decided against HGSI. 322a-407a. Nowhere in HGSI's briefs as either appellee or cross-appellant did it ever challenge the district court's legal holdings and factual findings that a conspiracy between Grace and HGSI existed. *Id.*

On the Sherman Act §1 claim, the Court of Appeals did not reach the causation issue nor the issue whether the Grace-HGSI conspiracy survived abbreviated or full-scale rule of reason review. Instead, the Court of Appeals *sua sponte* decided to adjudicate the unbriefed issue of whether an antitrust conspiracy existed at all, holding that it did not because the imposition of restrictive covenants on the transfer of land and leases to HGSI was a "unilateral" act by Grace. 307 F.3d at 281-83.

REASONS FOR GRANTING THE WRIT

This case involves an extensive longlasting circuit conflict on whether, and under what circumstances, a federal appellate court may consider issues that were never briefed on appeal. It also involves a conflict between the Fourth Circuit and decisions of other circuits and this Court on an important antitrust issue: whether restrictive covenants imposed on transferred business assets can constitute an agreement in restraint of trade that, if unreasonable, violates Sherman Act §1. The two issues are related because the Fourth Circuit's decision to *sua sponte* adjudicate the antitrust conspiracy issue uninformed by any briefing led it to a conspiracy holding that conflicts with not only current authority, but nearly 600 years of contrary precedent.

I. The Pervasive Circuit Split on FRAP 28

The Courts of Appeals are hopelessly split on the issue of whether in a civil case they may consider issues that were

not raised in appellate briefing, and if so whether any meaningful criteria constrain their power to do so.

A. The Relevant Rules. The issue that has split the Courts of Appeals is created by varying interpretations of Federal Rule of Appellate Procedure 28. That rule provides that: "The appellant's brief *must* contain . . . (5) a statement of the issues presented for review" and also "(9) the argument, which *must* contain . . . appellant's contentions and the reasons for them..." FRAP 28(a) (emphasis added). Likewise, "The appellee's brief *must* conform to the requirements of Rule 28(a)(1)-(9) and (11)," requirements that as just quoted include these requirements of an argument with contentions and a statement of issues presented for review, except that the appellee's obligation to supply a statement of issues applies only when "the appellee is dissatisfied with the appellant's statement" of issues. FRAP 28(b) (emphasis added). These rules impose a clear mandatory obligation for appellants and appellees to raise any issues they wish an appellate court to consider.

To be sure, Federal Rule of Appellate Procedure 2 provides that appellate courts may relieve parties of the default caused by their failure to follow the rule requiring them to raise issues in their appellate briefing when otherwise "manifest injustice" would occur. See FRAP 2 & Advisory Committee Notes. But, in cases where parties have not raised an issue in their appellate briefing, this doctrine has largely been limited to criminal cases where, unless the issue were considered, a person would be wrongfully imprisoned.[2] Moreover, even in such criminal cases, this doctrine has been limited to situations where the issue was nonetheless presented to the Court of Appeals (either by another party on appeal or indirectly through briefing on another issue) and the opposing party was not

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[2] See *United States v. Allen*, 127 F.3d 260, 264 (2d Cir.1997); *United States v. Babwah*, 972 F.2d 30, 34 (2d Cir.1992); *United States v. Gray*, 626 F.2d 494, 497 (5th Cir.1980); *United States v. Anderson*, 584 F.2d 849, 853 (6th Cir.1978); *U.S. v. Olano*, 934 F.2d 1425, 1439 (9th Cir. 1991); *United States v. Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988).

prejudiced because it had a full opportunity to brief the issue.[3] The only exceptions consistently permitted by all circuits in civil cases are for issues that involve jurisdictional questions (since a court always has jurisdiction to decide its jurisdiction) or that involve intervening changes in law that have been raised in supplemental briefing (since those could not have been included in the initial appellate briefing).[4]

This narrowly defined manifest injustice doctrine has no application to this civil case, where the relevant issue was not even indirectly presented on appeal, involves no jurisdictional question or intervening change in law, and the opposing party had no opportunity to be heard on the issue. In civil cases that do not meet these narrow defined criteria for a "manifest injustice" exception, the circuits are thoroughly in conflict, with some circuits finding Rule 28 mandatory and other circuits finding that they have open-ended discretion to relieve parties of its mandate.

B. Circuits Finding Rule 28 Mandatory. Many Courts of Appeals have held that the mandatory language of Rule 28 means that they are not free to exercise discretion to consider issues or arguments that parties have not raised on appeal.[5] The Seventh Circuit has reasoned:

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[3] *See Allen*, 127 F.3d at 264; *Babwah*, 972 at 34; *Olano*, 934 F.2d at 1439; *Rivera Pedin*, 861 F.2d at 1526 n.9; *Gray*, 626 F.2d at 497; *Anderson*, 584 F.2d at 853.

[4] *See, e..g, Tallahassee Mem'l Reg'l Med. Ctr. v. Brown*, 815 F.2d 1435, 1445 n.16 (11th Cir.1987) (although jurisdictional issue was "not preserved in its initial brief" it would be considered because "Questions of jurisdiction . . . can appropriately be raised at any time in the litigation"); *DSC Comm. v. Next Level Comm.*, 107 F.3d 322, 326 n.2 (5th Cir.1997) (rule against considering issues that were not raised in appellate briefing does not bar considering supplemental briefing after an intervening change in law).

[5] Previous versions of Rule 28 contained different numbering of sections of 28(a) but contain the same substance as Rule 28(a)(5) & (9). To the extent the amendments to Rule 28 do matter, they only strengthen the case for mandatory treatment by substituting the word "must" for the previous word "shall."

> Rule 28(a)(4) of the Federal Rules of Appellate Procedure mandates that an appellant must present in its brief the issues to the appellate court that the appellant desires to litigate. . . . . We consistently and evenhandedly have applied the waiver doctrine when appellants have failed to raise an issue in their opening brief.

Sere v. Board of Trustee, 852 F.2d 285, 287 & n. 3 (7th Cir.1988). A long line of Seventh Circuit cases has insisted that this rule be applied "consistently and evenhandedly."[6] Likewise, the Fifth Circuit has concluded:

> Rule 28(a)(4) has been construed as a mandate that the brief of the appellant contain a statement of the issues presented for review, and an argument portion which analyzes and supports those contentions. . . . As a consequence, it has been stated that issues "not raised or argued in the brief of the appellant may be considered waived and thus will not be noticed or entertained by the court of appeals." . . We have applied such a waiver in a number of cases.

Matter of Tex. Mortgage Services Corp., 761 F.2d 1068, 1073 (5th Cir.1985) (citations omitted). Subsequent Fifth Circuit decisions have cited this case for the proposition that: "It is well-settled that when a party fails to brief an issue, it *cannot* be considered on appeal."[7] The Fifth Circuit has specifically held that Rule 28 bars considering the existence of an antitrust conspiracy when that issue was not briefed on appeal:

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[6] *Jones v. Union Pacific*, 302 F.3d 735, 741 (7th Cir.2002); *Rodriguez v. United States*, 286 F.3d 972, 977 n.3 (7th Cir.2002); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 668 (7th Cir. 1998). *See also Williams v. Leach*, 938 F.2d 769, 772 (7th Cir. 1991) ("By failing to raise the issue . . ., [the party] has waived the issue on appeal.") (citing FRAP 28(a)(4)).

[7] *T.L. James v. Traylor Bros.*, 294 F.3d 743, 750 (5th Cir. 2002) (emphasis added); *Palma v. Verex Assur.*, 79 F.3d 1453, 1463 (5th Cir.1996), ("'"issues not raised on appeal in the brief of the Appellant . . . cannot be noticed or entertained by the Court of Appeals'") (citation omitted); *Diaz v. Methodist Hosp.*, 46 F.3d 492, 494 n.2 (5th Cir.1995) (same); *Boddie v. City of Columbus*, 989 F.2d 745, 751 (5th Cir.1993) (same).

> neither [a party's] principal brief nor its reply brief contain argument setting forth its contentions, and accompanying reasons, with respect to [the conspiracy issue relevant to] a section 1 complaint, as required by Federal Rule of Appellate Procedure 28(a)(4). Thus, this matter is considered as waived.

In re Municipal Bond Reporting Antitrust Litigation, 672 F.2d 436, 439 n.6 (5th Cir 1982).

The First, Third, Tenth and Eleventh Circuits have also adhered to the same mandatory rule in cases that do not fall within the narrow "manifest injustice" exception. The First Circuit has reasoned:

> An appellant waives any issue which it does not adequately raise in its initial brief, because "in preparing briefs and arguments, an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed."

Charles v. Rice, 28 F.3d 1312, 1320 (1st Cir.1994) (citation omitted). Indeed, the First Circuit has stressed that Rule 28 bars it from considering even issues that were raised in appellate briefing if they were not sufficiently developed in its argumentation.[8] Similarly, the Third Circuit has held:

> Rule 28(a) and (b) of the Federal Rules of Appellate Procedure provide that the parties' briefs shall contain a statement of the issues presented for review. . . . This court has repeatedly declined to address an argument that the party has not raised in its brief as required under Rule 28(a)(4). As we stated in Wisniewski v. Johns-Mansville Corp., 812 F.2d 81, 88 (3d Cir.1987), "[a]n issue that is not addressed in an appellant's brief is deemed waived on appeal."

Winston v. Children & Youth Servs., 948 F.2d 1380, 1385 (3d Cir.1991); *Institute for Scientific Info. v. Gordon and Breach*, 931

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[8] *See U.S. v. Tracy*, 989 F.2d 1279, 1286 (1st Cir. 1993) ("It is well settled that issues are deemed waived when 'adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation.' Notice pleadings do not suffice for appellate briefs.") (citing FRAP 28(a)(5)); *Sanchez v. Puerto Rico Oil*, 37 F.3d 712, 716 n.2 (1st Cir. 1994) (same).

F.2d 1002, 1011 (3d Cir. 1991) ("Nowhere in the 'Statement of the Issues Presented' or the 'Argument' section of plaintiff's appellate brief" is the relevant issue raised. "We conclude, therefore, that under Fed.R.App.P. 28(a)(2)-(4), plaintiff abandoned" that issue).[9] Likewise, the Tenth Circuit has ruled:

> Appellate procedure requires that an appellant's brief shall contain an argument with appellant's contentions with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. Fed.R.App.P. 28(a)(4). Appellants who fail to argue the issue in their brief are deemed to have waived their contention on appeal.

Jordan v. Bowen, 808 F.2d 733, 736 (10th Cir. 1987); *see also Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1026 n.2 (10th Cir.1994) (same). The law in the Eleventh Circuit is to the same effect. *Sims v. Mashburn*, 25 F.3d 980, 983 (11th Cir. 1994) (citing Rule 28(a) for the proposition that an issue that is not presented in appellate briefing is waived). These circuits do not necessarily hold that Rule 28 always bars the consideration of unbriefed issues, but rather that appellate courts have no discretion to ignore the Rule 28 mandate unless the narrow criteria of the manifest injustice exception are met.

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[9] Indeed, the Third and Fifth Circuits have held that even issues that *were* listed in the statement of issues presented cannot be considered on appeal unless they were *also* addressed in the argument section of the brief. *U.S. v. Beaumont*, 972 F.2d 553, 563 (5th Cir. 1992) (citing FRAP 28(a)(4)); *United States v. Lindell*, 881 F.2d 1313, 1325 (5th Cir.1989) (same); *Harris v. Plastics Mfg.*, 617 F.2d 438, 440 (5th Cir. 1980) (same); *Kiewit Eastern, v. L & R Constr.*, 44 F.3d 1194, 1204 n. 30 (3d Cir.1995) ("Under Fed.R.App.P. 28(a)(5), an appellant is required to list the issues raised on appeal and present an argument in support of them. When an issue is not pursued in the argument section of the brief, the appellant has abandoned and waived that issue on appeal.") (quoting *Travitz v. Northeast Dep't ILGWU Health & Welfare Fund*, 13 F.3d 704, 711 (3d Cir. 1994). *A fortiori*, this doctrine would apply where, as here, the issue was raised in *neither* the statement of issues nor the argument section of HGSI's briefing.

C. Circuits Finding Rule 28 Discretionary. In contrast, the Second, Sixth, Eighth, and Federal Circuits have asserted that, despite the nondiscretionary character of the "must" language in Rule 28, they have open-ended "discretion" to consider issues not raised in appellate briefs, even when the narrow manifest injustice exception does not apply. The Second Circuit has held:

> We recognize that a litigant's failure to comply with Rule 28 does not automatically preclude us from considering an issue. Just as it is within our discretion to decide certain legal questions sua sponte, we may overlook a litigant's failure properly to present an issue on appeal in unusual circumstances, one being where manifest injustice would otherwise result.

Frank v. United States, 78 F.3d 815, 833 (2d Cir.1996) (citations omitted). Similarly, the Sixth Circuit has held that it only "normally decline[s] to consider issues not raised in the appellant's opening brief[s]," and thus considers on a case by case basis whether to adhere to this normal "policy." *Bickel v. Korean Air Lines*, 96 F.3d 151, 153 (6th Cir.1996); *Priddy v. Edelman*, 883 F.2d 438, 446 (6th Cir.1989). Thus, when it declines to review an issue that was not raised in appellate briefing, the Sixth Circuit has characterized its decision as an exercise of its "discretion." *Markowitz v. Toledo Metro. Hous. Auth.*, 608 F.2d 699, 708 (6th Cir.1979) ("TMHA has not raised any of the possible errors on appeal. In our discretion, we decline to review.")[10] The

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[10] Subsequent cases indicate that the Sixth Circuit may have switched to join the circuits recognizing that the mandatory character of Rule 28 makes this a nondiscretionary decision. *See Ewolski v. City of Brunswick*, 287 F.3d 492, 516-17 (6th Cir.2002) ("'Federal Rule of Appellate Procedure 28(a) requires that an appellant's brief include "a statement of the issues presented for review," and "[a]n argument" on each issue presented.' . . . . These grounds are not addressed anywhere in the Appellant's brief. Therefore, we decline to consider them."); *Thaddeus-X v. Blatter*, 175 F.3d 378, 403 n.18 (6th Cir.1999) ("We do not address defendants' belated argument that they are entitled to qualified immunity. It was not presented to this court in the initial briefs on appeal and is therefore waived. Fed. R.App. P. 28(a)(3) and (b) (stating that the appellee's brief must include an argument containing the contentions of the parties and

Eighth Circuit has held that its appellate panels "have discretion to consider issues not raised in the briefs, 'particularly where substantial public interests are involved.'" *Hatley v. Lockhart*, 990 F.2d 1070, 1073 (8th Cir.1993); *Continental Ins. v. Northeastern Pharm.*, 842 F.2d 977, 984 (8th Cir. 1988) (same).[11] The Federal Circuit has held that "the sound practice that an issue not raised by an appellant in its opening brief . . . is waived . . . is, of course, not governed by a rigid rule but may as a matter of discretion not be adhered to where circumstances indicate that it would result in basically unfair procedure." *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990).

Although not expressly using the word "discretion," the D.C. and Ninth Circuits have effectively adopted the same discretionary doctrine, ruling that appellate courts should conduct an open-ended balancing of interests to determine whether to abide by the rule against considering issues not raised in appellate briefing. The D.C. Circuit has held:

> notwithstanding the requirements of Federal Rule of Appellate Procedure 28, regarding the contents of briefs on appeal, we may also consider points not raised in the briefs or in oral argument. Our willingness to do so rests on a balancing of considerations of judicial orderliness and efficiency against the need for the greatest possible accuracy in judicial decisionmaking. The latter factor is of

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the reasons for them).") Either way one characterizes the Sixth Circuit, though, the circuit split remains.

[11] As with the Sixth Circuit, subsequent Eighth Circuit cases suggest a possible switch to join the circuits recognizing the mandatory character of Rule 28. *See United States v. Gonzales*, 90 F.3d 1363, 1369-70 (8th Cir.1996) ("Rule 28(a)(6) of the Federal Rules of Appellate Procedure requires an appellant's brief to 'contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on.' Fed. R.App. P. 28(a)(6). Failure to abide by this provision on an issue is deemed to be an abandonment of that issue."); *United States v. Brooks*, 175 F.3d 605, 606-07 (8th Cir.1999) (same). Again, even if the Eighth Circuit has switched sides on this issue, the circuit conflict remains.

> particular weight when the decision affects the broad public interest.

Consumers Union v. FPC, 510 F.2d 656, 662 & nn. 9-10 (D.C. Cir. 1974). Similarly, the Ninth Circuit has held that, even though a party did not raise an issue on appeal, "court of appeals may review issues sua sponte under exceptional circumstances, where substantial public interests are involved, or where to not do so would be unduly harsh to one or both of the parties." *U.S. v. Hoyt*, 879 F.2d 505, 514 (9th Cir. 1989).

The Fourth Circuit has joined the discretionary camp. It has expressly characterized itself as exercising "discretion" over whether to hear issues that were not briefed on appeal, holding that "we have considerable discretion in 'the matter of what questions may be taken up and resolved for the first time on appeal.'" *Abril v. Virginia*, 145 F.3d 182, 185 n.4 (4th Cir. 1998). In *Abril*, the Fourth Circuit decided that, "as a matter of discretion" it should not consider an issue that, like the one here, was not raised in appellate briefing since that would mean the opposing party would have "had no opportunity to be heard." *Id.*[12] But the Fourth Circuit's ruling here necessarily implies that it decided here to exercise its discretion in the opposite direction: to decide an issue that had never been raised in appellate briefing.[13] This

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[12] The Fourth Circuit had exercised its purported discretion in the same way in prior cases. *See Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n.2 (4th Cir.1996) (issue that parties failed to "raise in their opening brief . . . is not properly before a court of appeals. That the question was raised in the district court is immaterial. The [parties'] omission of the issue from their initial brief denied [the opposing party] an opportunity to respond, so considering it now 'would be unfair to the appellee and would risk an improvident or ill-advised opinion on the legal issues raised.'") (citations omitted).

[13] *See also Fayetteville Area Chamber of Commerce v. Volpe*, 463 F.2d 402, 406 (4th Cir. 1972.) (considering an issue that "appellants . . did not raise . . . in their briefs on appeal," where appellants "alluded in oral argument to" the issue). Other Fourth Circuit opinions had indicated that it would join the circuits holding that, outside the narrow limits of the manifest injustice exception, Rule 28's prohibition against considering issues not raised in appellate briefing was mandatory. *See 11126 Baltimore Blvd. v.*

is one of the many problems with legal standards that confer such standardless discretion: they provide no protection against arbitrary inconsistent rulings that, unlinked to objective criteria, may have more to do with the political popularity of the parties.

D. The Importance of the Issue. The law in those circuits adopting an open-ended discretionary exception to Rule 28 cannot be squared with the plain "must" language of that rule, which leaves no room for such an exception. Such standardless discretion not only violates the letter of Rule 28, but its spirit, for the manifest purpose of the rule is to narrow the issues presented for appeal and to give opposing parties fair warning of the issues and arguments they should rebut in their briefing. If courts of appeals may always reach out to decide *sua sponte* any unbriefed issue they fancy making law about, then parties either (a) will be subjected to decisions on which they were given no opportunity to be heard or (b) will have to write kitchen-sink briefs to protect themselves, throwing in discussions of every issue that might occur to the court of appeals. Given existing page limits, the latter would mean briefs that thinly cover every possible issue, thus depriving parties of a real meaningful opportunity to be heard (and courts of useful briefing) on *any* issue.[14]

Prince George's County, 58 F.3d 988, 993 n.7 (4th Cir.1995); *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999). But subsequent Fourth Circuit decisions state that the rule from these cases applies only "normally," without specifying what the criteria are for deciding that some cases are not normal. *See Carter v. Lee*, 283 F.3d 240, 252 n.11 (4th Cir.2002); *Hillman v. IRS*, 263 F.3d 338, 342 (4th Cir.2001). These subsequent cases thus indicate the Fourth Circuit has reverted to a discretionary standard, which is confirmed by the holding in this case.

[14] The issue whether Courts of Appeals can consider issues that were never raised on appeal differs in these respects from the issue whether they can consider issues that are briefed on appeal but were not raised in the district court. On the latter issue, this Court has held that: "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). But that issue is not governed by the mandatory language of

Nor does such standardless discretion over the very issues that can be considered on appeal comport with fundamental rule of law norms. As Lon Fuller observed, the rule of law requires that "in acting upon the citizen... a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties."[15] Here, Rule 28 declares that parties have a right to consider final an issue decided below that the other party has not challenged on appeal. As the Seventh Circuit has properly emphasized in a series of opinions, fulfilling the purpose of this rule requires "consistently and evenhandedly" applying this Rule to all parties who fail to raise issues in their appellate briefing. See *supra* I.B. (collecting cases). A reading of Rule 28 that instead allows Courts of Appeals to exercise standardless discretion would also fail to provide the due process required by the U.S. Constitution since it subjects parties on appeal to an arbitrary process and denies them a meaningful opportunity to be heard on issues that the Courts of Appeals decide without the benefit of any briefing. The lack of any criteria to constrain this open-ended discretion is highlighted by the fact that courts of appeals exercising it often, as was true here, do not even bother to go through the motions of providing reasons to conclude that they are justified in deciding an issue never raised in appellate briefing.

Finally, this practice of considering issues without briefing is harmful to the sound development of law and

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Rule 28, and considering a legal issue that is briefed for the first time on appeal does not deprive the opposing party of a meaningful opportunity to be heard on the legal issue. (It might deprive the party of an opportunity to present relevant facts, but that can be taken into account in resolving the legal issue). In any event, even in that case, this Court held that this discretion was constrained by the law that the appellate court could not "decid[e] the issue without [the opposing party's] having had an opportunity to be heard." *Id.* That holding thus plainly conflicts with the Fourth Circuit's decision in this case to decide the conspiracy issue even though VVL had no opportunity to brief it.

[15] LON L. FULLER, THE MORALITY OF LAW 209-10 (rev. ed. 1969).

administration of justice. The dangers of deciding such issues without the benefit of briefing are illustrated by the fact that here it led to a decision that without explanation conflicts with not only nearly 600 years of precedent, *see infra* at II, but also the law of the case reflected in the prior 1998 Fourth Circuit holding in the first appeal that such a donation coupled with restrictive covenants did state a Sherman Act §1 conspiracy claim, *see* 156 F.3d at 539-41.[16]

The issue here is no different because HGSI was defending the judgment below. HGSI was allowed to cross-appeal any decisions in the district court that were adverse to it, and in its cross appeal HGSI did not raise any objection to the district court's finding of a conspiracy. 322a-407a. Further, even if HGSI's cross-appeal were not technically necessary,[17] Rule 28(b) requires that an appellee's brief contain his arguments and contentions, as well as a statement of issues if the appellee is dissatisfied with the appellant's statement of issues. Thus, the conspiracy issue could not be considered on appeal because HGSI nowhere in its briefing as appellee or cross-appellant raised any objection to the lower court's finding of a conspiracy. 322a-407a.[18]

E. Review on the Rule 28 Issue Should Thus Be Granted. Granting certiorari on the Rule 28 issue is accordingly appropriate on no less than three separate grounds. First, the Fourth Circuit and others circuits are in conflict on an extremely "important matter" - the fundamental issue of

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[16] This 1998 ruling necessarily rejected the argument, which HGSI had made in that first appeal (but did not renew in the current appeal), that a donation coupled with restrictive covenants was not a conspiracy. *See* 408a-410a.

[17] The motion to cross-appeal was granted over the objections of VVL.

[18] *Accord Winston*, 948 at 138 ("Even if a cross-appeal was not technically necessary, as the dissent argues, defendants did not even argue in their brief on appeal that the district court should have abstained. Rule 28(a) and (b) of the Federal Rules of Appellate Procedure provide that the parties' briefs shall contain a statement of the issues presented for review.")

what issues may be considered on appeal. U.S. Supreme Court Rule 10. This circuit conflict would not benefit from any further "percolation" in the appellate courts, having lasted for decades without producing opinions that meaningfully advance the analysis.

Second, the Fourth Circuit's decision to reach out and decide an issue that was never briefed on appeal, without allowing any opportunity for supplemental briefing, and without even giving any reasons for its remarkable decision, "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." *Id.*

Third, this is "an important question of federal law that has not been, but should be, settled by this Court." *Id.* Especially given this Court's special supervisory role over the federal appellate process, it is not appropriate for the lower courts to be deciding issues on appeal that were never raised (as Rule 28 requires) in appellate briefing without any decision by this Court authorizing this dubious but important practice.

One might be concerned that certiorari review would be difficult on this issue because of the Fourth Circuit's failure to write any opinion explaining the reasons underlying its decision to waive the requirements of Rule 28. But the issue here is an abstract one of the appropriate legal standard to apply to issues that are not raised in appellate briefing. That abstract issue spans many myriad factual situations in multiple circuits, and analysis of that issue in no way turns on the factbound particulars of this case. To the extent the particular facts might matter, this Court can always resolve the conflict among the circuits regarding the proper legal standard and remand for the lower court to apply that standard to the particular facts.

In any event, the failure of a lower court to issue an opinion explaining its actions should not be permitted to insulate those actions from review. That would only reward an undesirable practice. *See Virginian Ry. Co. v. U.S.*, 272 U.S. 658, 674-75 (1926) (Brandeis, J.) (criticizing lower court opinion that "made no finding or statement bearing upon

its exercise of discretion" because it means that a reviewing appellate court, "being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case"). Rather, if this Court deems the lack of a lower court opinion on this issue an insuperable barrier to hearing that issue, then this Court should at a minimum follow its ordinary practice of granting certiorari, vacating the judgment, and remanding with directions that the lower court provide an opinion explaining its resolution of the relevant issue. *See, e.g., Times-Mirror. v. NLRB*, 331 U.S. 789 (1974); *Northcross v. Memphis Board of Education*, 412 U.S. 427 (1973); *Taylor v. McKeithen*, 407 U.S. 191 (1972). Such a remand not only would constitute a proper exercise of this Court's power to supervise lower appellate courts, but would be necessary to protect its certiorari jurisdiction over issues that would be worthy of review if a lower court opinion had been written. Such a remand for articulation of the standards the lower court used is particularly appropriate where, as here, the heart of the matter is precisely the lower court practice of exercising standardless discretion -- a discretion whose standardless character is only exacerbated by the lack of any reasoned opinion exercising it.

II. The Conflict on What Constitutes an Antitrust Conspiracy

The Fourth Circuit held that a restrictive covenant not to compete imposed on a transfer of business assets involves "unilateral" conduct that cannot be challenged as an agreement in restraint of trade even when utterly unreasonable. It is not surprising this decision was uninformed by any briefing, for it put the Fourth Circuit in conflict not only with numerous decisions by this Court and other circuits, but with nearly 600 years of contrary precedent on this specific issue.

A. The Fourth Circuit Holding That Noncompete Covenants Are Unilateral. The Fourth Circuit reasoned that the noncompete covenants here were unilateral because:

> VVL did not proffer evidence that HGSI joined any resource to Grace's in order to establish the covenants, or to affect the land transfer. Nor did VVL allege that HGSI exercised a right or economic power in consideration for the gift. In other words, insofar as the record discloses, only Grace, not HGSI, exercised any form of right, resource, or economic power. . . . Grace alone had the right and power to attach the covenants. Its unilateral action in doing so was, for the reasons discussed above, beyond the reach of section 1. . . . Grace alone had the power to give away the land. The donation represented merely a transfer of right, resource, and economic power from Grace to HGSI. . . . All the benefits, not attributable to the covenants, that Grace expected to enjoy as a result of the gifting, *e.g.*, tax benefits, were benefits that did not stem from an act by HGSI. Tax deductions, for example, are the result of the government's largesse, not the giftee's reciprocation. . . . Had HGSI been in a position to impose a covenant and offered that covenant in exchange for the parcel, a court could find that Grace and HGSI had combined economic power to establish the covenants and that consequently there had been concerted action.

307 F.3d at 283–84.

In so holding, the Fourth Circuit explicitly rejected the lower court's holding that an antitrust conspiracy was proven by HGSI's agreement to accept the land and lease transfers and be subject to the attached restrictive covenants. *Id.* at 281-83. The Fourth Circuit was well aware that HGSI's willingness to accept the properties was necessary to confer not only the tax deduction, but also to free Grace from $1-1.1 million in carrying costs, since the Fourth Circuit knew the lower court had found both factors were major motives for Grace's decision to transfer the land and leases to HSGI with restrictive covenants. 144 F. Supp 2d at 567, 573-74, 587, 593.

> Grace viewed donating to HGSI as a solution to the problems associated with its strategy of retaining the reserves to keep them from VVL. By donating to an anti-mining organization that would agree to far-reaching restrictions on mining, Grace could eliminate its carrying costs and related expenses, and yet continue to prevent VVL from acquiring those reserves.

Id. at 573-74. Thus, the Fourth Circuit must have meant to exclude HGSI's willingness to pay $1-1.1 million to cover carrying costs from its implicit definition of the sorts of "rights, resources or economic power" or "consideration" that under its legal standard HGSI had to contribute to achieve the anticompetitive outcome. 307 F.3d at 282-83. Since this willingness to contribute money was not deemed relevant, the decisive element must have been the Fourth Circuit's reasoning that HGSI's actions were not necessary to impose the restrictive covenants themselves because such covenants can be unilaterally imposed by the original property owner before the transfer of property. The implicit notion appears to be that these restrictive covenants reflect nothing more than the unilateral exercise of Grace's common law property rights.

B. The Conflict With Common Law Treatment of Noncompete Covenants Attached to Property Transfers. Nearly 600 years of common law precedent has treated the imposition of noncompete covenants on a transfer of business assets as agreements in restraint of trade. Indeed, such noncompete covenants were the very first kind of agreement held to be an illegal restraint of trade, going back all the way back to *Dyer's Case*, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (1414). For hundreds of years such noncompete covenants were even treated as per se illegal restraints of trade.[19] This per se rule was changed to a rule of reason in

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[19] *See Anonymous Case*, 72 Eng. Rep. 477 (Q.B. 1578); *Colgate v. Bacheler*, 78 Eng. Rep. 1097 (Q.B. 1602); *see also United States v. Addyston Pip.*, 85 F. 271, 280 (6th Cir. 1898) (Taft, J.) (noting that the rule in *Dyer's Case* "had no exception"), *aff'd*, 175 U.S. 211 (1899).

Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711). That case held that noncompete covenants imposed on a sale of business assets were presumptively illegal agreements in restraints of trade, but that this presumption could be rebutted when the covenants were ancillary to the transaction's procompetitive purposes. *Id.* at 350-52; *Addyston Pipe*, 85 F. at 279-82 (so interpreting the case). Thus, while *Mitchel v. Reynolds* changed the substantive rule for judging the legality of a noncompete covenant imposed on a transfer of business assets, nowhere did it purport to change the law that such covenants were agreements in restraint of trade that would, if unreasonable, be illegal.

This remains the common law today. Under current contract law, an agreement in restraint of trade is created by any covenant that prohibits a buyer or lessee from using the property or business they have received to compete with the transferor of the property or business. *See* Restatement of Contracts §516(b). Such agreements are thus illegal if unreasonable. *Id.* §§513-14; Restatement (Second) of Contracts §186-188.

In short, nearly 600 years of uninterrupted authority conflict with the Fourth Circuit conclusion that restrictive covenants imposed on the transfer of business assets are unilateral acts that can never be challenged as agreements in restraint of trade, no matter how unreasonable they are.

C. The Conflict With Antitrust Authority on Noncompete Covenants. Sherman Act §1 reflected and incorporated these common law notions of what constitutes an agreement in restraint of trade, notions which not only included but began with such noncompete covenants imposed on the transfer of business assets. *See Addyston Pipe*, 85 F. at 279-82 ("Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being" subject to affirmative punishment "but were simply . . . not enforced by the courts. The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense"), *aff'd*, 175 U.S. 211; *Bus. Elec. v. Sharp Elec.*, 485 U.S. 717, 730 n.3 (1988); Goldschmid, *Antitrust's*

Neglected Stepchild: A Proposal for Dealing With Restrictive Covenants Under Federal Law, 73 COLUM. L. REV. 1193, 1204 (1973)("almost frivolous to deal with the question of whether an unreasonably restrictive covenant may be treated as an actionable restraint under Section 1 of the Sherman Act, since an affirmative answer seems so clear. . . . There is little doubt that the Sherman Act intended to apply to those restraints that were unenforceable at common law."); 2 RUDOLF CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES §16-13, at 48 (1986) ("the leading case on ancillary covenants not to compete . . . held that they are to be considered under federal antitrust statutes in like manner as they were under the common law")(citing *Addyston Pipe*).

> Throughout the history of the Sherman Act, the federal courts have followed the celebrated case of ... *Addyston Pipe* ..., in which ... Judge Taft held that any restrictive covenant affecting interstate commerce that was unenforceable at common law also violated the Sherman Act. ... Thus, ... the antitrust laws prohibit unreasonable covenants not to compete ...

Handler & Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 750-51 (1982).

> Historically, the term "restraint of trade," as originally applied, referred merely to an ancillary agreement by the vendor of a business not to compete with his buyer in the transferred business. However, the common law meaning of the term has since been expanded to include any agreement ... the object of which is to suppress competition.

I EARL KINTNER, FEDERAL ANTITRUST LAW §3.3, at 83 (1980). It would make no sense to say that the very sort of covenant first held to constitute an illegal agreement in restraint of trade - before that concept was expanded to encompass all sorts of other anticompetitive agreements - does not constitute an agreement at all, and thus is legal even when unreasonable.

Not surprisingly, numerous decisions in this Court and other circuits conflict with the Fourth Circuit's new doctrine that noncompete covenants that an owner of business assets "unilaterally" attaches to its property before transferring it do not constitute agreements at all and are thus immune from rule of reason scrutiny. Instead, this Court - along with the Courts of Appeals of the Third, Sixth, Seventh, Eighth, and Eleventh Circuits -- hold precisely the opposite: that such noncompete covenants imposed on transfers of property or business assets are agreements that are judged under the rule of reason. *See Bus. Elec.*, 485 U.S. at 730 n.3; *Schine Chain Theatres v. United States*, 334 U.S. 110, 119 (1948); *Harold Friedman v. Thorofare Markets*, 587 F.2d 127, 140, 140-44 (3rd Cir.1978); *Perceptron, Inc. v. Sensor Adaptive Machs.*, 221 F.3d 913, 919 (6th Cir. 2000); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981); *United States v. Empire Gas Corp.*, 537 F.2d 296, 307-08 (8th Cir.1976); *Consultants & Designers v. Butler Serv. Group*, 720 F.2d 1553, 1560-61 (11th Cir.1983). The Fourth Circuit decision that rule of reason review does not apply here is thus in conflict with all these decisions.

True, most covenants imposed on the transfer of business assets, like most vertical agreements generally, are typically judged reasonable under the rule of reason because they generally advance procompetitive purposes and affect too small a share of any market to have anticompetitive effects. But here the agreement clearly had the anticompetitive purpose and effect of suppressing competition from VVL, which Grace even monetized as worth $1.5 million. *See supra* Statement of Case. Nor could that anticompetitive purpose and effect be accomplished without a property transfer coupled with restrictive covenants. Given the $1-1.1 million in carrying costs, it would have been profit-maximizing for Grace to sell the property to VVL if Grace could not transfer the properties to some third party with a restriction prohibiting mining, since that was the only alternative that would suppress VVL competition while eliminating these carrying costs. *See supra* Statement of Case.

Further, such covenants reflect nakedly unreasonable restraints of trade when they are not ancillary to any procompetitive transactional purpose. "If a sale conveys only the tangible assets of a business, and not a going concern or the goodwill thereof, then a covenant not to compete is not necessary to protect the good will, and is therefore void." 2 RUDOLF CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES §16-14, at 472 (Supp April 2002). The sale here involved precisely such a transfer of only tangible assets without goodwill. Likewise, a vertical agreement warrants summary condemnation where, as here, it does nothing more than raise rivals' costs by suppressing resources to prevent them from being used. "An agreement with significantly greater anticompetitive potential is one that does nothing more than cut off the access of rivals to essential inputs.... Such agreements are readily condemned because they not only raise a rival's costs or foreclose it from the market, but generally do so with no offsetting efficiency benefit." XI HOVENKAMP, ANTITRUST LAW ¶1804c, at 106 (1998). Thus, while such vertical agreements are rare, when they exist they are "naked" restraints on output that warrant summary condemnation. *Id.* This is that rare case.

In any event, whether the proper rule of reason review is full scale or abbreviated, the Fourth Circuit doctrine here denies any rule of reason review at all. This conflicts with the precedent in this Court and other circuits that the noncompete covenants here must be judged under some form of rule of reason review.

The common law precedent on noncompete covenants is also relevant to the Sherman Act §1 analysis in two other ways. First, the plain language of the Sherman Act §1 defines the covered concerted action as a "contract, combination . . . or conspiracy." Thus, concerted action under Sherman Act §1 at a minimum includes any "contract," and as just shown, the Restatement of Contracts itself states that "contracts" include restrictive covenants imposed on a transfer of land, leases or other business assets. *See also* Goldschmid, *supra*, at 1204 ("Certainly,

covenants ... restraining sellers or lessors should be construed as 'contracts' within the meaning of the Act."); VI AREEDA, ANTITRUST LAW 146 (1986)("The contract is a conspiracy without [any need for] proof of motive."); *id.* at 4 ("a simple sale of goods is by definition an agreement although it presumptively raises no antitrust issue.")[20]

Second, the common law precedent bears directly on the Fourth Circuit's implicit notion that the restrictive covenants were unilateral acts because they were unilaterally enforceable by Grace against HGSI as a matter of property law. In fact, if VVL can show such restrictive covenants are unreasonable, then they are also unenforceable as a matter of property law against HGSI. Thus, what causes the anticompetitive effect here is not the operation of property law resulting from Grace's imposition of the covenants, but rather HGSI's willingness to abide by the agreement it struck with Grace. And here the district court's finding of a conspiracy rested on detailed findings that -- wholly aside from the covenants – Grace and HGSI had an agreement barring HGSI from using the property for vermiculite mining. 144 F.Supp.2d at 589-92; 108 F.Supp.2d at 563-70. Since an unreasonable covenant thus cannot of its own force constrain trade, the Fourth Circuit was legally wrong to conclude that Grace's imposition of such a covenant mooted this factual finding of an extra-covenant conspiracy.[21] This would likewise be true for *any* restrictive

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[20] Nor can one make a condition "unilateral" by isolating it from the agreement to which it is attached. A useful analogy is tying law. "Every sale reflects an agreement of some sort," and is thus taken to reflect "a *tying* agreement" whenever coupled with the tying condition. X AREEDA, ELHAUGE & HOVENKAMP, ANTITRUST LAW 286 (1996); *Ungar v. Dunkin' Donuts*, 531 F.2d 1211, 1224 (3d Cir. 1976)("a formal agreement is not necessary, although it is sufficient"); *Response of Carolina v. Leasco Response*, 537 F.2d 1307, 1328 (5th Cir. 1976). *See also* XI HOVENKAMP, ANTITRUST LAW 152 (1998) ("an express exclusive dealing condition in a contract triggers...the Sherman Act").

[21] Indeed, here many of the covenants were imposed on leases and thus could not simply be unilaterally inserted in Grace's deeds but required HGSI's express agreement to the terms of the lease assignment. 144 F. Supp. 2d at 579. Further, because the owned land was subject to

covenant challenged as an unreasonable restraint of trade under Sherman Act §1.[22]

D. The Conflict With Copious Other Authority on Antitrust Conspiracies. Quite apart from the particular doctrine governing covenants not to compete with transferred assets, the Fourth Circuit's new doctrine conflicts with a vast array of other cases defining antitrust conspiracies.

In *Poller v. CBS*, 368 U.S. 464 (1962), this Court rejected the argument that Sherman Act §1 was not violated when the alleged harm was caused entirely by the exercise of property rights by one of the conspirators. There the plaintiff was a CBS affiliate who claimed that CBS conspired to terminate the plaintiff and replace plaintiff with the other television station. *Id.* at 465-66. The co-conspirators were the other television station and the individual who obtained the option to buy it for CBS. *Id.* at 466, 468. This Court rejected the argument that this claim did not state an antitrust violation because CBS was merely exercising its unilateral

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obligations to pay mining royalties, the insertion in those deeds of a covenant not to mine was unenforceable as a breach of the good faith duty to the royalty owners, and indeed had never been inserted in one deed for that reason. *Id.* at 604, 606-09; 156 F.3d at 541-42. Thus, the covenants were not operative of their own force but required HGSI's ongoing agreement to be effective.

[22] That any unreasonable restrictive covenant is legally unenforceable does not undermine finding a conspiracy because "No formal agreement is necessary to constitute an unlawful conspiracy." *American Tobacco v. U.S.*, 328 U.S. 781, 809 (1946). Indeed, *all* agreements in restraint of trade are unenforceable at common law, and the courts have had no trouble concluding that agreements unenforceable by contract law remain illegal under federal antitrust law. *See, e.g., Dr. Miles v. John D. Park*, 220 U.S. 373, 404-08 (1911). Otherwise, even horizontal price-fixing agreements would enjoy antitrust immunity because they not legally enforceable contracts. Instead, an agreement remains actionable as long as defendants continue to *comply* with that agreement, whether or not that agreement was ever legally enforceable. *U.S. v. Socony-Vacuum*, 310 U.S. 150, 227 (1940) ("A conspiracy thus continued is in effect renewed during each day of its continuance.").

property rights to terminate the plaintiff's affiliation and buy another television station.

> It may be that CBS by independent action could have exercised its granted right to cancel WCAN's affiliation upon six months' notice and independently purchased its own outlet in Milwaukee. However, if such a cancellation and purchase were part and parcel of unlawful conduct or agreement with others or were conceived in a purpose to unreasonably restrain trade, ... then such conduct might well run afoul of the Sherman Law.

Id. at 468-69. This holding necessarily conflicts with the Fourth Circuit's doctrine, which would instead indicate that there could be no antitrust conspiracy not to deal with the plaintiff in *Poller* because there the co-conspirators did not add any "right, resource, or economic power" necessary to accomplish the restraint of trade. Indeed, the factual situations are quite similar, for the conspiracy in *Poller* was essentially that one supplier of a necessary input (there television programming) agreed to instead sell it to someone else to keep it from the plaintiff for anticompetitive reasons, just like here.

The Fourth Circuit decision likewise conflicts with *NYNEX. v. Discon*, 525 U.S. 128 (1998), which held that an agreement between a plaintiff's rival and one buyer to stop buying from plaintiff and instead buy from plaintiff's rival was an antitrust conspiracy subject to rule of reason review. It also conflicts with *Sharp*, which held that an agreement between a manufacturer and a dealer to have the manufacturer terminate another dealer constituted an agreement subject to rule of reason review. 485 U.S. 726-27. Both those agreements were held subject to rule of reason review even though their effect on the plaintiff was fully achieved by the exercise of one firm's property rights (the buyer's in *NYNEX* and the manufacturer's in *Sharp*).

The Fourth Circuit decision also conflicts with decisions in other circuits that find conspiring to help another firm take action that restrains trade suffices to state an antitrust conspiracy. *See, e.g., Industrial Bldg. Materials v. Interchemical*

Corp., 437 F.2d 1336, 1341-43 (9th Cir. 1970); *Loeb Industries, v. Sumitomo Corp.*, 306 F.3d 469, 497-98 (7th Cir. 2002) (to prove a conspiracy, a plaintiff need only show that one conspirator "knew [its co-conspirator] intended to restrain trade, intended that trade be restrained, and materially contributed to that restraint"). One conflicting case from another circuit involved a factual situation particularly close to the one here. In *Helix Milling v. Terminal Flour Mills*, 523 F.2d 1317 (9th Cir. 1975), the plaintiff needed to buy a new mill to stay in business because its own mill had burned down. *Id.* at 1319-20. Its rival bought the mill that plaintiff wanted to buy to prevent plaintiff from staying in competition with it. *Id.* The plaintiff alleged that, but for the sale to the rival, the original mill owner would have sold the mill to the plaintiff. *Id.* The court held that this purchase was an agreement that could be challenged under Sherman Act §1. *Id.* at 1320-22. This again necessarily conflicts with the Fourth's Circuit's holding here that a property transfer cannot come within Sherman Act §1 because it "represented merely a transfer of right, resource, and economic power" rather than a "a merging of the two defendants' rights, resources, or economic power." 307 F.3d at 283.

More generally, the Fourth Circuit's new doctrine conflicts with every case in this Court and any other Circuit finding any vertical agreement covered by Sherman Act §1. The Fourth Circuit decision holds that no antitrust agreement ever exists unless the downstream party adds "resources, rights, or economic power" that are necessary to impose the vertical restraint. *Id.* at 282. But in *every* vertical agreement one could say, under the panel's logic, that the upstream seller has "unilaterally" exercised its property rights over its goods to impose a condition on the buyer, and that "the vertical restraint ordinarily does not increase anyone's market power but merely reflects the pre-existing 'power' of one party." VII AREEDA, ANTITRUST LAW 4 (1986). Exclusive dealing, tying, and vertical price and nonprice restraints would all be immunized from §1 scrutiny under the Fourth Circuit's logic. For instance, under its logic, all the §1 claims in the Microsoft litigation would have been

immune from substantive scrutiny because Microsoft was "unilaterally" exercising its property rights to impose conditions on its copyright licenses barring buyers from using Netscape. The Fourth Circuit decision thus really conflicts with every case in this Court and other circuits that ever found a vertical agreement subject to either rule of reason or per se scrutiny under §1.

Such a sweeping change in doctrine is not warranted by *Copperweld*, where this Court sharply limited its holding, stating: "We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act." *Copperweld v. Independence Tube*, 467 U.S. 752, 767 (1984). Indeed, that case acknowledged the statute reached any "'contract, combination ... or conspiracy'" between *separate* entities," and ruled only that a parent and wholly owned subsidiary were not separate entities under antitrust law. 467 U.S. at 768. No case other than the one below has ever extended *Copperweld* to the issue whether a conspiracy exists between what are, as here, concededly separate entities.

CONCLUSION

The petition for a writ of certiorari should be granted on both issues. Certiorari could also be granted on either issue separately because reversal would follow from a decision that the Fourth Circuit's rejection of the district court's conspiracy holding was either procedurally improper or substantively erroneous. In the alternative, this Court should at a minimum grant, vacate and remand with directions for the Fourth Circuit to issue an opinion explaining its reasons for deciding the antitrust conspiracy issue despite the lack of any appellate briefing on that issue.

Respectfully Submitted,

Einer Elhauge
Counsel of Record
Counsel for Petitioner

January 30, 2003

No. _____

Supreme Court, U.S.
FILED
021167 JAN 30 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

VIRGINIA VERMICULITE, LLC,

Petitioner,

v.

THE HISTORIC GREEN SPRINGS, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 01-1850(L)
(CA-95-13-3-C)

Virginia Vermiculite, Limited,
Plaintiff - Appellant,

versus

The Historic Green Springs, Incorporated,
Defendant - Appellee.

ORDER

The court amends its opinion filed October 4, 2002, and reported at 307 F.3d 277, as follows: On page 2, section 5 -- the section is corrected to read: "Affirmed by published opinion. Judge Luttig wrote the opinion, in which Judge Williams and Judge Michael joined."

For the Court - By Direction

/s/ Patricia S. Connor
Clerk

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VIRGINIA VERMICULITE, LIMITED,
Plaintiff-Appellant,
v.
THE HISTORIC GREEN SPRINGS, INCORPORATED,
Defendant-Appellee,

and No. 01-1850

W.R. GRACE & COMPANY - CONNECTICUT,
Defendant.

NATIONAL TRUST FOR HISTORIC PRESERVATION; THE LAND TRUST ALLIANCE,
Amici Curiae.

VIRGINIA VERMICULITE, LIMITED,
Plaintiff-Appellee,
v.
THE HISTORIC GREEN SPRINGS, INCORPORATED,
Defendant-Appellant,

and No. 01-1925

W.R. GRACE & COMPANY - CONNECTICUT,
Defendant.

NATIONAL TRUST FOR HISTORIC PRESERVATION; THE LAND TRUST ALLIANCE,
Amici Curiae.

Appeals from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Jr., Senior District Judge. (CA-95-15-3-C)

Argued: May 6, 2002
Decided: October 4, 2002
[Entered: October 4, 2002]
[Amended: December 3, 2002]

Before LUTTIG, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by published opinion. Judge Luttig wrote the opinion, in which Judge Williams and Judge Michael joined.

COUNSEL

ARGUED: Einer Richard Elhauge, Cambridge, Massachusetts, for Appellant. Charles Hubert Montange, Seattle, Washington, for Appellee. **ON BRIEF:** Brian A. Glasser, BAILEY & GLASSER, L.L.P., Charleston, West Virginia, for Appellant. Paul W. Edmondson, Vice President & General Counsel, Elizabeth S. Merritt, Deputy General Counsel, Anita C. Canovas, Assistant General Counsel, NATIONAL TRUST FOR HISTORIC PRESERVATION, Washington, D.C., for Amici Curiae.

OPINION

LUTTIG, Circuit Judge:

Virginia Vermiculite, Limited (VVL) appeals a district court order granting summary judgment to Historic Green Springs, Incorporated (HGSI) on VVL's claim that HGSI and W.R. Grace & Company (Grace) conspired to restrain trade of Louisa County, Virginia, vermiculite mining rights, in violation of section 1 of the Sherman Act. VVL also appeals the district court's verdict, after a bench trial, that the alleged conspiracy did not constitute a violation of the Virginia Civil Conspiracy Act (VCCA). Although we disagree with the district court's reasoning, we agree with its ultimate conclusions, and therefore affirm.

I.

The relevant facts, which are amply set forth in the prior appeal, *see Virginia Vermiculite, Ltd.* v. *W.R. Grace & Co.*, 156 F.3d 535 (4th Cir. 1998) (*VVL I*), and the district court's thorough opinions, *see Virginia Vermiculite, Ltd.* v. *W.R. Grace & Co.*, 108 F. Supp. 2d 549 (W.D. Va. 2000) (*Summary Judgment*); *Virginia Vermiculite, Ltd.* v. *W.R. Grace & Co.*, 144 F. Supp. 2d 558 (W.D. Va. 2001) (*Trial*), are as follows.

VVL brought suit against Grace and HGSI, a nonprofit organization dedicated to preserving the Green Springs National Historic Landmark District in Louisa County, Virginia, in a controversy involving the mining and purification of vermiculite, a scarce mineral with many industrial uses. Domestic vermiculite reserves are only known to exist in Montana, South Carolina and Virginia. The Virginia reserves lie almost entirely within Louisa County.

In 1976, VVL began mining vermiculite in Louisa County. At that time, Grace held, unused, an overwhelming percentage of the region's vermiculite-laden lands. Though

Grace originally planned to mine its Virginia holdings, by 1991 it decided that the costs required to build a local purification plant were prohibitive. In an attempt to sell its unused holdings, Grace began negotiations with the region's sole vermiculite miner, VVL. The companies failed to reach agreement, however, and Grace instead entered discussions with HGSI about the possibility of donating the land to the nonprofit. Grace ultimately decided to donate its holdings to HGSI, and proceeded to do so through a gift-deed, which, importantly, limited the gift by concurrently attaching restrictive covenants to the land deeds. The covenants, waiveable only by agreement of Grace and the gift-deed holders (*i.e.*, HGSI), prohibited use of the land for vermiculite mining or transport.

VVL brought suit against Grace and HGSI alleging violations of sections 1 and 2 of the Sherman Act and related state law provisions. Specifically, VVL claimed that the donation constituted an unreasonable restraint of trade of Louisa County vermiculite mining rights and a violation of the VCCA. The district court dismissed VVL's section 1 claim against Grace, and all claims against HGSI, for failure to state a claim, but on appeal we reversed. *See VVL I*, 156 F.3d 535.

On remand, the district court granted summary judgment to Grace and HGSI on all antitrust claims except for conspiracy to monopolize. *See Summary Judgment*, 108 F. Supp. 2d at 554. Grace subsequently settled all claims with VVL, removing itself from this action. The district court, after a bench trial, found in favor of HGSI on all remaining counts. *See Trial*, 144 F. Supp. 2d at 610. VVL only appeals the district court's grant of summary judgment to HGSI on the section 1 claim, and the court's judgment for HGSI on the VCCA claim.

II.

VVL contends that the district court erred by granting summary judgment on the section 1 claim to HGSI under the rule of reason. We agree with the district court's disposition of VVL's claims, though we do not reach the detailed rule of reason analysis the district court undertook. We instead affirm the grant of summary judgment on the basis of the reasoning below.

A.

We review *de novo* a grant of summary judgment under section 1 of the Sherman Act, *see Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451, 466 (1992), to determine if the plaintiff "establish[ed] the existence of [all] element[s] essential to [its] case, and on which [it] would bear the burden of proof at trial." *Celotex Corporation* v. *Catrett*, 477 U.S. 317, 322 (1986). Because VVL claims that Grace and HGSI conspired in violation of section 1 of the Sherman Act, it must establish, as a genuine issue of fact, that Grace and HGSI entered into an *illegal*, conspiratorial agreement. *See Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986).

B.

It is incontestable that "concerted action" in restraint of trade lies at the heart of a Sherman Act section 1 violation. The language of the Act expressly requires such a concert. *See* 15 U.S.C. § 1 ("Every contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal."). The Supreme Court has gone so far as to say that the "distinction between unilateral and concerted action is *critical*," *Fisher* v. *Berkeley*, 475 U.S. 260, 266 (1986) (emphasis added), and is "*necessary* for a proper understanding of the [act]," *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 (1984) (emphasis added).

Because "[i]ndependent action is not proscribed [by § 1]," *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984), courts may impose antitrust liability on the basis of unilateral conduct only under section 2 of the Sherman Act, which prohibits monopolization and attempts to monopolize. *See, e.g., Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

Under this well-established framework, it is incumbent on VVL, if it is to survive summary judgment, to proffer evidence that can establish the existence of illegal, concerted activity by the defendants in restraint of trade.

The district court recognized the imperative that evidence of concerted action be proffered on the section 1 claim. *See Summary Judgment*, 108 F. Supp. 2d at 563. It also understood that the analysis is governed by the Supreme Court's statements that the plaintiff must prove the defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective," *Monsanto*, 465 U.S. at 764, and that the plaintiffs evidence must "tend[ ] to exclude the possibility that the alleged conspirators acted independently," *Matsushita*, 475 U.S. at 588. Having stated these principles as its authority, the court held that "evidence of the donations containing restrictive covenants alone satisfies the plaintiff's burden of producing sufficient evidence to establish concerted action under § 1," *Summary Judgment*, 108 F. Supp. 2d at 563, and in so doing, rejected HGSI's contrary argument that "engaging in these transactions [*i.e.*, taking receipt of the gift-deed and its attached covenants] is not evidence of concerted action." *Id.* The district court erred in this conclusion.

The term "concerted action" must be construed in a more refined manner, for "concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2," *Fisher*, 475 U.S. at 266. Thus, it is of "`considerable importance' that independent activity by a single entity be

distinguished from a concerted effort by more than one entity *to fix prices or otherwise restrain trade ,*" *id.* (citation omitted) (emphasis added).

The Supreme Court, in further describing the conduct that constitutes concerted activity for section 1 purposes (*i.e.*, susceptible to section 1 condemnation as being unlawful for fixing prices or restraining trade), has said that it:

> deprives the marketplace of the independent centers of decision making that competition assumes and demands . . . . [It] reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. [It involves a] merging of resources.

Copperweld, 467 U.S. at 769 (Burger, C.J.).

In *Copperweld*, the Court, citing to *Monsanto*, which was decided just three months earlier, rejected the contention that a parent corporation and an individually incorporated, but wholly-owned subsidiary of that parent, could engage in concerted activity that was unlawful under section 1. Notwithstanding the everyday sense in which their joint efforts were concerted action, their conduct was held not to be concerted action for purposes of section 1, because "agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." *Id.*

Copperweld well demonstrates that the Supreme Court has applied a gloss to the term "concerted action" when using it in the antitrust context. And, accordingly, courts must treat this phrase as a term of art in the context of the Sherman Act; it cannot be understood as it might be in ordinary parlance, to reach any and all forms of joint activity by two or more persons. It must be defined

consonant with its role in the antitrust analysis, as the basis for determining the unlawfulness of conduct prohibited by section 1.

We reaffirm what was made clear by *Copperweld*, that concerted activity susceptible to sanction by section 1 is activity in which multiple parties join their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests (by way of profit maximizing choices).

Purported gift transactions can present atypical antitrust questions. If the gift is genuine, *i.e.*, if it is given unilaterally and in no way reflects a merging of the parties' resources, rights, or economic power, then it satisfies section 1. On the other hand, if the parties combine (*i.e.*, bring into concert) their resources, rights, or economic power in such a way as to counteract naturally competing interests that would otherwise set them at odds, though they try to disguise the combination by way of a gift transaction, concerted action is present and their conduct falls within the purview of section 1.

In the instant case, VVL proffered no evidence that the donation by Grace to HGSI was not a genuine (*i.e.*, unilaterally given) gift. It often can be difficult to determine whether a purported gift is a gift in fact, or whether it merely disguises bilateral action by which two parties join their resources, rights, or economic power together. But here, VVL simply did not proffer evidence sufficient to raise that difficult question. VVL did not proffer evidence that HGSI joined any resource to Grace's in order to establish the covenants, or to affect the land transfer. Nor did VVL allege that HGSI exercised a right or economic power in consideration for the gift. In other words, insofar as the record discloses, only Grace, not HGSI, exercised any form of right, resource, or economic power. And neither was the

transaction brought about by, or in order to achieve, a merger of the two parties' forces, which might in turn be trained in a "particular direction," *see Copperweld*, 467 U.S. at 769, counteracting the naturally competing interests that would otherwise set them at odds.

Grace alone had the right and power to attach the covenants. Its unilateral action in doing so was, for the reasons discussed above, beyond the reach of section 1. As a result, we conclude that VVL did not proffer evidence that the defendants "had a conscious commitment to a common scheme designed to achieve an *unlawful* objective," *Monsanto*, 465 U.S. at 764 (emphasis added).

VVL's theory of HGSI's liability rests on the contrary presumption that concerted action existed by virtue of HGSI's receipt of the gift. Throughout its briefs, VVL characterizes HGSI's receipt of the gift as affirmative section 1 action, terming the covenants that Grace attached to the land as the "Grace and HGSI covenants," and referring to the attachment of the covenants to the land as something HGSI actively did, along with Grace. *See, e.g.*, Appellant's Br. at 8; *see also id.* at 51.

To bolster its theory, VVL spends a great deal of its brief attributing the restrictive effect of the covenants directly to HGSI's willingness to receive the gift from Grace. For example, VVL cites portions of the district court's opinions in this case, interchanging the district's court precise finding that "a substantial portion of the merchantable Virginia vermiculite reserves is foreclosed *by the donations*," *Summary Judgment*, 108 F. Supp. 2d at 575, for the different conclusion that "`a substantial portion of the merchantable Virginia vermiculite reserves is foreclosed *by' the Grace-HGSI conspiracy*." Appellant'sBr. at 78; *see also id.* at 8, 11, 21, 34, 35. We do not find this approach persuasive.

First and foremost, HGSI's receipt of the gift did not reflect a merging of the two defendants' rights, resources, or economic power. Grace alone had the power to give away the land. The donation represented merely a transfer of right, resource, and economic power from Grace to HGSI. Because there was no merger at all, *a fortiori*, the donation cannot be understood as reducing the diverse directions in which the parties' forces had been aimed, nor as resulting in the training of such forces in one particular direction.*

VVL's theory also implies that Grace benefitted from gifting the land to HGSI, and that such benefits were inducements from HGSI to establish the covenants. But, in the absence of an exercise by HGSI of a right, resource, or economic power to induce Grace to act as it did, HGSI contributed nothing to Grace. All the benefits, not attributable to the covenants, that Grace expected to enjoy as a result of the gifting, *e.g.*, tax benefits, were benefits that did not stem from an act by HGSI. Tax deductions, for example, are the result of the government's largesse, not the giftee's reciprocation.

This conclusion squares with the long-established tradition of understanding gift-giving as a unilateral activity, despite the all too obvious fact that every gift ultimately involves someone else's receipt. It would be an odd result for the mere receipt of a gift to be viewed as proof of concerted action in the antitrust context, while in all other legal contexts gift-giving is wholly defined by reference to its unilateral character.

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* VVL apparently recognizes the necessity of construing "concerted activity" in the manner we suggest is required, attempting to characterize the defendants' conduct as resulting because they "thought they needed an agreement *to restrain them[selves] from making certain market choices*." Appellant's Br. at 17. What VVL's implicit admission with holds, however, is the equally important acknowledgment that the "mar ket choices" the two parties to concerted activity must be trying to avoid, are market choices that would set them at odds.

All this is not to say that in the instant case, HGSI did not in fact join some right, resource, or economic power to Grace's, in order to achieve an outcome otherwise unachievable due to the naturally competing interests of the two. It is only to say that VVL did not proffer evidence of such. Had HGSI been in a position to impose a covenant and offered that covenant in exchange for the parcel, a court could find that Grace and HGSI had combined economic power to establish the covenants and that consequently there had been concerted action. But VVL proffered no evidence of an exercise of right, resource, or economic power by HGSI that diminished market forces created by the naturally competing interests of the two entities.

Because VVL failed to proffer evidence that Grace's actions were not unilateral and that Grace and HGSI engaged in concerted activity as that term must be understood in the antitrust context, the creation of the covenants and the giving of the gift-deed cannot be held to be conduct proscribed by section 1, and HGSI cannot be held liable for them.

C.

Because we conclude that the alleged conduct was not a violation of section 1, we need not, and do not, address VVL's claim that the district court erred by failing to condemn the conduct under quick-look.

Quick-look only "fills in the continuum between *per se* analysis and the full rule of reason," providing a framework for addressing conduct with clear anticompetitive impact, but for which procompetitive justifications also exist, *Continental Airlines, Inc.* v. *United Airlines, Inc.*, 277 F.3d 499, 509-10 (4th Cir. 2002). Here, there are no section 1 anticompetitive effects at all.

III.

Because there was no antitrust wrong, VVL cannot recover under the VCCA. The district court heard VVL's VCCA claim against HGSI from the bench and concluded that "VVL failed to establish [ ] that HGSI's and Grace's concerted actions caused, threatened to cause, or will cause VVL to suffer any injury," *Trial*, 144 F. Supp. 2d at 610. This judgment followed a bench trial, whose legal conclusions we review *de novo* and whose factual findings we review for clear error. *See Waters* v. *Gaston County, N.C.*, 57 F.3d 422, 425 (4th Cir. 1995). Upon our review, we conclude, as a matter of Virginia law, that VVL's claim is precluded, and thus we do not reach the district court's causation analysis.

The VCCA only imposes liability on those who, in concert, "willfully and maliciously *injure*[ ] another in his reputation, trade, business, or profession by any means whatever," Va. Code Ann. § 18.2-499 (2002) (emphasis added). Because "the basis of the [VCCA] action is the *wrong* which is done under the conspiracy," *Gallop* v. *Sharp*, 19 S.E.2d 84, 86 (Va. 1942) (emphasis added), VVL must point to a violation of a legally protected interest in order to succeed in its suit. *See Citizens for Fauquier County* v. *SPR Corp.*, 37 Va. Cir. 44 (1995) ("Where there is no actionable claim for the underlying alleged wrong, there can be no [VCCA] action . . .").

It follows, *a fortiori*, that without a section 1 or section 2 violation by HGSI or Grace, HGSI could not have injured any protected right of VVL's, and thus VVL cannot prevail under the VCCA.

CONCLUSION

For the reasons stated herein, the judgment of the district court granting HGSI summary judgment on VVL's section 1 claim is affirmed. Likewise, we affirm the district court's verdict for HGSI on VVL's VCCA claim.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CIVIL ACTION NO. 3:95CV00015

VIRGINIA VERMICULITE, LTD.,	)
Plaintiff,	)
	)
v.	)
	)
W.R. GRACE & CO.-CONN.,	)
and THE HISTORIC GREEN	)
SPRINGS, INC.,	)
Defendants.	)

[Entered: May 24, 2001]

FINAL ORDER AND JUDGMENT
JUDGE JAMES H. MICHAEL, JR.

Pursuant to Federal Rule of Civil Procedure 58, and in accordance with the accompanying Findings of Fact and Conclusions of Law, it is this day ADJUDGED, ORDERED, and DECREED that final judgment be, and it hereby is, entered in favor of the DEFENDANT, the Historic Green Springs, Incorporated. The Clerk of the Court hereby is directed to strike this case from the docket of the court, and to send a certified copy of this order and the accompanying Findings of Fact and Conclusions of Law to all counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CIVIL ACTION NO. 3:95CV00015

VIRGINIA VERMICULITE, LTD.,	)
Plaintiff,	)
	)
v.	)
	)
W.R. GRACE & CO.-CONN.,	)
and THE HISTORIC GREEN	)
SPRINGS, INC.,	)
Defendants.	)

[Entered: May 24, 2001]

FINDINGS OF FACT AND CONCLUSIONS OF LAW
JUDGE JAMES H. MICHAEL, JR.

**1 With the consent of the parties, the court tried this case without a jury. The trial began on September 11, 2000, and ended on October 2, 2000. Having thoroughly considered all of the evidence and testimony, the court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

Inevitably, in a case as complex as that at the bar, some findings of fact involve mixed questions of fact and law. In those instances, findings of fact and conclusions of law have been stated as a unit as an aid to following the flow of information and the impact of that flow on the conclusions of law. By main strength and awkwardness, the fact matters and the law conclusions could have been separated, but it is thought that the sometimes combined usage herein, and occasional repetition thereof, are more conducive to the proper flow of the opinion's analysis.

JURISDICTION

The court has original jurisdiction over this civil action pursuant to 15 U.S.C. §§ 15, 22, 26, and 28 U.S.C. §§ 1331, 1337, 1367.

ISSUES PRESENTED

The issues presented are as follows:

***561** 1. Whether the plaintiff, Virginia Vermiculite, Limited ("VVL"), proved by a preponderance of the evidence that the remaining defendant, The Historic Green Springs, Incorporated ("HGSI"), conspired to monopolize in violation of the Sherman Act and Virginia Antitrust Act. *See* 15 U.S.C.A. § 2 (West 1997 & Supp. 2000); Va. Code Ann. § 59.1-9.6 (Michie 1998 & Supp. 2000).

2. Whether VVL proved by clear and convincing evidence that HGSI conspired to injure VVL in its reputation, trade, business, or profession, in violation of the Virginia Conspiracy Act. *See* Va. Code Ann. §§ 18.2-499, -500 (Michie 1996 & Supp. 2000).

FINDINGS OF FACT

1. VVL is a Virginia limited partnership engaged in the business of mining, processing, and selling a mineral known as vermiculite. (Stipulation of Facts (Aug. 23, 2000) ("Stip.") ¶ 1.)

2. W.R. Grace & Co.-Conn. ("Grace") is a Connecticut corporation engaged in the supply of specialty chemical, construction, and container products servicing the food, consumer products, petroleum refinery, and construction industries. One of Grace's businesses is engaged in the mining, processing, and selling of vermiculite. (Stip. ¶ 2.) Grace was a defendant in this and

two previously consolidated cases, but reached a settlement with VVL immediately prior to trial. On the first day of trial, the court endorsed the settlement and dismissed Grace from all three actions.

**2 3. HGSI is a Virginia nonprofit corporation dedicated to the preservation of the Green Springs National Historic Landmark (the "District" or "Landmark District"). (Stip. ¶ 53.)

4. The Landmark District is located in Louisa County, Virginia. It covers an area of approximately 14,000 acres, and is roughly the shape of an oval basin seven miles long and five miles wide. (Def.'s Trial Ex. ("DTX") 92.)

5. The Landmark District was designated a national landmark because it contains a wide variety of historic homes in a clearly-defined rural landscape. (Trial Transcript ("Tr.") at 2134-35.)

6. The Landmark District also contains substantial deposits of vermiculite.

7. Vermiculite is a naturally-occurring, mica-like mineral found in the ground. (Stip. ¶ 3; Pl.'s Trial Ex. ("PTX") 383 at 16772.)

8. Mining is accomplished by the "open pit" method using bulldozers, draglines, and backhoes. The topsoil is removed and stockpiled for later reclamation. (PTX 383 at G16786; Tr. at 122-23, 179-84.)

9. When vermiculite is mined, the ore is taken to a processing plant or mill relatively close to the mining site, and processed to remove moisture, rock, dirt, dust, extraneous material, and small particles of vermiculite that are not saleable (collectively, the "tailings"). (Stip. ¶ 4; Tr. at 121-23, 140.)

10. To transport the ore from the mine to the processing mill, mining companies typically load the ore onto multi-ton dump trucks, which then carry the ore to the mill. (*E.g.*, Tr. at 969; PTX 383 at G16786.)

11. For example, at VVL's South Carolina operations, the trucks must travel an average distance of ten to fifteen miles from the mining site to the mill. (Tr. at 969.) Grace's average haul distance is twelve miles. (PTX 383 at G16786.)

12. The result of the processing operations at the mill is vermiculite concentrate, which is separated by grade according to the size of the flakes. (Stip. ¶ 5.)

***562** 13. The United States grading system classifies vermiculite into various size ranges, including grades 3, 4, and 5, (Stip. ¶ 6), grade 3 being coarser than the finergrades, 4 and 5. (PTX 11A-11G.)

14. Most applications for vermiculite require that the concentrate be heated in a process known as "exfoliation" or "expansion." This process causes the vermiculite to expand or pop in much the same way as popcorn pops when heated. (Stip. ¶ 7.)

15. Vermiculite is fireproof, and is used in a variety of horticultural, agricultural, industrial, and construction applications. (Stip. ¶ 8.)

16. Some of the applications for expanded vermiculite include the production of lightweight concrete, soil mixes, fertilizers, masonry block insulation, and spray-on fireproofing. (Stip. ¶ 9.)

17. Vermiculite is mined in a limited number of specific locations throughout the world, including the United States, China, Brazil, Australia, and Russia, and certain countries in Africa. It is imported primarily from companies doing business in South Africa and China. (Stip. ¶10.)

18. In the United States, commercially-viable reserves of vermiculite ore have been mined only in Virginia, South Carolina, and Montana. (Tr. at 169-71, 1395-96; PTX 117.)

19. The three largest participants in the world-wide vermiculite industry are the South Africa-based Palabora Mining Company ("Palabora"), Grace, and VVL. (Stip. ¶ 11.)

20. Palabora is the largest single producer of vermiculite in the world, and currently has twenty-five years' worth of reserves (or, "mining rights") in Africa. (Stip. ¶ 12.)

21. Grace and VVL are the second- and third-largest vermiculite producers in the world, respectively. (Stip. ¶ 13.)

22. VVL owns mining rights, conducts mining operations, and operates vermiculite processing plants in Virginia and South Carolina. (Stip. ¶ 15.)

23. VVL's South Carolina operation, Carolina Vermiculite ("CVC"), is a division of VVL; it is not a separate corporation. (Tr. at 888.)

24. CVC does not process any vermiculite mined in Virginia. (Stip. ¶ 16.)

25. Grace currently conducts mining operations only in South Carolina. Grace previously mined in Montana (but ultimately closed those operations), and never mined in Virginia. (Stip. ¶ 18.)

26. Grace sells and uses vermiculite internally, and also sells both vermiculite concentrates and expanded vermiculite to third parties. (Stip. ¶ 21.)

27. Grace and VVL primarily sell their vermiculite in North America, although Grace also exports some vermiculite outside of North America. (Tr. at 152-53, 1346-50, 1374; PTX 76 at G015524, G015598; PTX 383 at G16770, G16778-83.)

28. At least 2,000,000 tons of vermiculite reserves in South Carolina remain unleased by any mining company. (Stip. ¶ 20.)

29. North American vermiculite concentrate sales for 1991-1998 are shown in Table 1. (Stip. ¶ 14.)

30. In the 1960s, Grace was mining in Montana and in South Carolina, and believed it would need a "third mill" to replace depleting reserves or to add to existing reserves. (Stip. ¶ 23.)

31. Grace had a number of core businesses that were dependent upon vermiculite, and deemed it prudent to increase its **563 vermiculite holdings on the East Coast. (DTX 138 at G003120.)

32. To that end, Grace acquired substantial mining rights in Louisa County throughout the 1970s, either by buying properties containing vermiculite, or by leasing land from Louisa County property owners. Grace initially acquired the Louisa County reserves with the intent to mine them. Grace also purchased land that did not contain vermiculite reserves because of the land's logistical benefit to Grace's future mining operations. (Stip. ¶ 24.)

33. Two of those Louisa County property owners were Millard Fillmore Peers, Jr. ("M.F. Peers"), and his wife, Norma Peers (collectively, the "M.F. Peerses"). (Stip. ¶ 25.) The M.F. Peerses were plaintiffs in the previously-consolidated cases against Grace, but those cases were dismissed when Grace settled with the M.F. Peerses and with VVL.

**4 34. M.F. Peers testified at trial. His testimony was credible, unrefuted, and subject to virtually no cross-examination.

35. Mr. Peers was born in the District in 1913, and has lived there for seventyfive years. His father was a career farmer, and purchased 1300-1400 acres in Louisa County in the 1920s. His father often used his land for commercial purposes, such as by selling gravel from the river bed to be used in concrete, and by leasing his property to be used as an airport landing strip and as a drag strip. (Tr. at 496-509.)

36. Mr. Peers and his brother, Alfred Dabney Peers ("A.D. Peers"), acquired land under their father's will. Together they owned approximately 2000 acres in Louisa County. (Tr. at 510-11.)

37. As a farmer, M.F. Peers approved of vermiculite mining. His father often remarked that "he didn't think [they] were going to make a living off of the top of the ground and he thought it would have to come out of the underground." (Tr. at 523-24. *See also* Tr. at 526; PTX 42.)

38. Grace told M.F. Peers that Grace was depleting its reserves in South Carolina, that it did not have enough reserves to last another two years, and that it wished to buy, and then mine, M.F. Peers's property. (Tr. at 536-37.)

39. On December 27, 1972, Grace purchased two parcels from M.F. Peers (the "M.F. Peers properties"). (Stip. ¶ 26; PTX 47, 48.)

40. The first parcel ("Parcel I") contains 262.98 acres, and the second parcel ("Parcel II" or the "River Property") contains 276.42 acres. (Stip. ¶ 27.)

41. About half of Parcel I is located within the boundaries of the Landmark District. Approximately one-third of Parcel II is located within the Landmark District, that third being a peninsula-shaped tract of land comprising

the southern portion of the parcel, the property line of which more or less follows the contours of the South Anna River. (PTX 3.)

42. Grace entered into an agreement with the M.F. Peerses pursuant to which Grace would pay "per ton" royalties to the M.F. Peerses, if Grace, in its sole discretion, decided to mine the M.F. Peers properties. (Stip. ¶ 28; PTX 47, 51.)

43. Notwithstanding the discretionary clause, Grace promised M.F. Peers that it was going to mine the properties within two years. (Tr. at 536-38.)

44. M.F. Peers sold his land to Grace with the expectation that he would receive royalties from the mining. The sale price was lower than it otherwise would have been, to take account of the royalties M.F. Peers expected to receive. (Tr. at 536-37.)

**564 45. Grace knew of M.F. Peers's expectations when it purchased his properties. (Tr. at 536-38; PTX 45.)

46. Grace never mined the properties or paid a per ton royalty (or any royalty) to the M.F. Peerses. (Stip. ¶ 29.)

47. Also in 1972, HGSI was incorporated to preserve the Green Springs area, and, essentially, to prevent what it viewed as developmental threats to the area. (Tr. At 1650-62; Stip. ¶ 54.)

**5 48. Rae H. Ely, a Louisa County resident, at various times has served as officer, director, and attorney for HGSI, and currently is HGSI's President. (Stip. ¶ 57.)

49. From the time Grace began acquiring properties in Louisa County, Grace faced substantial opposition to its mining plans from HGSI, specifically from Ms. Ely, (Stip. ¶ 57), who began conducting intensive research into the vermiculite industry, frequently appeared in opposition to

Grace at meetings of the Louisa County Board of Supervisors, studied the area, advised local residents about mining and preservation, and organized grass-roots efforts to oppose mining and development. (*E.g.*, Stip. ¶ 58; (Ely dep. (Apr. 14, 1999) at 430); PTX 457, 458, 460; Tr. at 1689-91, 1869-84.)

50. HGSI opposed Grace because many of the properties Grace acquired in Louisa County were located within, or adjacent to, the Landmark District. (Tr. at 1659; Stip. ¶ 56; PTX 2, 3, 457.)

51. As noted *supra*, A.D. Peers and his wife, Elizabeth D. Peers (collectively, the "A.D. Peerses"), also owned land in Louisa County. (Stip. ¶ 30.) Like M.F. Peers, A.D. Peers was born in Louisa County and lived there nearly all of his life. (Tr. at 498-99.)

52. Grace purchased two parcels from the A.D. Peerses on December 27, 1973: the 36.62 acre "Parcel A," on which the A.D. Peerses resided, and the 228.99 acre "Parcel B" (the "A.D. Peers properties"). (Stip. ¶ 31; PTX 49.)

53. Parcel A is located entirely within the boundaries of the Landmark District, and more than half of Parcel B is located within the District. (PTX 3.)

54. An unrecorded agreement entered into on the same day of the property sale (the "1973 Agreement") established a per ton royalty rate that Grace would pay the A.D. Peerses, in the event that Grace, in its sole discretion, decided to mine the property. (Stip. ¶ 32; PTX 50.)

55. The 1973 Agreement contained a royalties provision, whereby Grace would pay the A.D. Peerses one dollar per ton of vermiculite mined, or a rate no less than the rate Grace paid others in the Louisa County area, in the event that Grace decided to mine. (Stip. ¶ 33.)

56. Although Grace retained sole discretion to decide whether to mine, the 1973 Agreement contained detailed provisions about when royalty payments were to be made, what statements Grace was required to give the A.D. Peerses, including what quantity and type of ore was removed, and what procedure the A.D. Peerses could follow to inspect Grace's records. (Stip. ¶ 34.)

57. When the A.D. Peerses sold their property to Grace, they did so with the expectation that the property would be mined and that they would receive royalties. (*E.g.*, PTX 45.)

58. Grace was aware of these expectations, (PTX 45), and believed that the A.D. Peers properties contained commercially-valuable vermiculite reserves. (Stip. ¶ 37.)

59. Under the 1973 Agreement, the A.D. Peerses also retained the right to occupy the premises until Grace notified the A.D. Peerses of its intent to resell or mine the property, at which time the A.D. Peerses could continue to occupy the premises until the date of closing of the resale, or for one year after Grace provided notice of intent to mine. (Stip. ¶ 35.)

**6 . The 1973 Agreement also contained a provision stating that, for thirty days after Grace's notice of intent to resell the property, the A.D. Peerses would have the option of buying back Parcel A. (Stip. ¶ 36.)

61. Grace never mined the A.D. Peers properties or paid a per ton royalty to the A.D. Peerses for vermiculite actually mined. Grace paid the A.D. Peerses $50,000 in advance royalties, although it was not required to do so under the 1973 Agreement. (Stip. ¶ 38; PTX 52.)

62. "Advance royalties," or "advanced mineral royalties," were prepayments of royalties which would be applied against actual royalties owed, if and when mining began. (PTX 52, 301.)

63. J. Murray and Ruth Hill also owned property in Louisa County, known as "Brandy Farm." (Stip. ¶ 39.)

64. On December 27, 1973, Grace leased a 60.24 acre parcel from the Hills known as "Brandy A." (Stip. ¶ 40.)

65. The Hills lived on a 37-acre parcel. That parcel is known as "Brandy B." (Stip. ¶ 41.)

66. Both parcels of the Brandy property are located entirely within the boundaries of the Landmark District. (PTX 3.)

67. Grace entered into an agreement to pay royalties to the Hills if Grace decided, in its sole discretion, to mine Brandy A. ("Brandy Agreement") (Stip. ¶ 42; *cf.* PTX 55 at H0726.)

68. Under the Brandy Agreement, Grace had the duty of maintaining the buildings on Brandy B as long as the Hills lived there. (Stip. ¶ 43.)

69. The Brandy Agreement provided in part that, once the Hills vacated Brandy

B, "no person shall use or occupy any of the buildings . . . on [Brandy B] without Grace's prior written permission and upon such conditions as Grace may reasonably impose." (Stip. ¶ 44.)

70. On March 13, 1974, largely through HGSI's efforts, the Landmark District was designated a national landmark. (Stip. ¶ 52; DTX 92 at 3.)

71. Ms. Ely collected preservation easements on nearly half the acreage in the District and offered most of them to the Secretary of the Interior, who subsequently assigned management of the properties to the National Park Service. (PTX 312 at 010445; DTX 92 at 3.) The National Park Service entered into a cooperative agreement with HGSI to manage those easements. (DTX 92 at 6.)

72. On May 17, 1976, Grace leased a 255.53 acre parcel from Elgin H. and Betty Craig Nininger, known as the "Nininger property." (Stip. ¶ 47.)

73. The Nininger property is located entirely within the boundaries of the Landmark District. (PTX 3.)

74. The Nininger lease term ran for thirty-five years, through May 17, 2011. (PTX 306.) The lease created no obligation upon Grace to mine the premises, leaving the decision to mine in Grace's discretion. (*Cf.* PTX 56 at H0361.)

75. The Nininger property contains vermiculite reserves estimated by Grace in 1992 to be approximately 700,000 tons. (Stip. ¶ 97.)

76. The Nininger property is zoned for vermiculite mining. (Stip. ¶ 98.)

77. Grace never mined the Brandy or Nininger properties. (Stip. ¶ 48.)

78. In 1976, VVL leased and began mining its first property in Louisa County, **566 n as the "Purcell property." (Stip. ¶¶ 49, 59; Tr. at 112.)

79. The Purcell property contains 459 acres, of which VVL leased approximately 120 acres, containing reserves of approximately 580,000 tons of vermiculite concentrates. (Stip. ¶ 50.)

80. The Purcell property is located entirely within the boundaries of the Landmark District. (PTX 3.)

81. The relative geographic positions of these properties are as follows. The point of reference is Route 22 in Louisa County, which runs east to west. Nininger is located south of Route 22, and all of the other properties are located north of Route 22. Of the northern properties, Purcell is located furthest east. West of Purcell is M.F. Peers Parcel II. That parcel is a wooded area adjacent to the South Anna River. West of the southern portion of M.F. Peers Parcel II are the Brandy parcels. Consequently, M.F. Peers Parcel II lies directly between the Brandy and Purcell properties. The Brandy properties also lie directly north of the Nininger property, across Route 22. The A.D. Peers properties are situated west of the Brandy properties. West of A.D. Peers is the other M.F. Peers property, Parcel I. (Stip. ¶ 51; PTX 3; Tr. at 110-19.)

82. Overall, Grace purchased 1084 acres and leased 260 acres in Louisa County. (PTX 301.) The initial cost to Grace was $615,800. Grace also had to pay $56,000 in annual advanced mineral royalties under the Nininger and Brandy leases. (PTX 301.)

83. The South Carolina operations, now known as VVL's CVC division, were established in 1983. (PTX 307.)

84. The Hills ultimately notified Grace that its maintenance duties under the Brandy Agreement would be triggered on October 1, 1984. (Stip. ¶ 45.)

85. Reluctant to assume the added costs of those responsibilities, Grace agreed with Brandy Farm, Ltd. (to which the Brandy properties since had been conveyed) to modify the agreement, to permit Brandy Farm, Ltd. to lease the Brandy Farm in its entirety to third parties. (Stip. ¶ 46.)

86. In 1986, Grace perceived itself as "dominat[ing] the North American market," producing 72% (249,200 of 343,800 tons) of vermiculite consumed in North America. (PTX 307 at G002406, G002410). Grace estimated that Palabora produced 13% (44,000 tons) of vermiculite consumed in North America, and that VVL also produced 13% (12% (42,600 tons) at its Virginia division, and 1% (5,000 tons) at its South Carolina division (CVC)). (PTX 307 at G002406.)

87. Although in 1986 Grace believed that "[t]he ability of new competitors to enter the vermiculite market [was] severely hampered by limited access to commercial vermiculite deposits, capital requirements, the economies of scale developed by existing producers and, limited access to distribution," (PTX 307 at G002440), Grace also recognized VVL's fledgling South Carolina division as "a potentially significant new competitor." (PTX 307 at G002434.)

**8 . Grace initially purchased the properties in and around the District in the 1970s with the intent to mine them, but ultimately retained the properties for about twenty years without ever mining in Virginia.

89. The reason Grace retained the Louisa County reserves for twenty years without mining them, and yet continued to pay advanced mineral royalties, was to keep those reserves from its competitor, VVL. Internal Grace memoranda confirm that this was Grace's "strategy." (PTX 321. *See also* PTX 312 at 010448 ("[Grace] has continued to pay advanced mineral royalties to maintain mining rights, although at this time, it is primarily a defensive measure serving to keep Virginia Vermiculite from securing these reserves."); DTX 138 (stating that the "one benefit" gained from retaining the properties "is that Virginia Vermiculite is kept from acquiring these reserves").)

90. In late 1990, Grace closed its operations in Montana, as well as several of its exfoliating plants. (DTX 95 at 2.)

91. In December 1990, Ned Gumble, the manager of VVL's Louisa County plant, informed Gregory E. Poling, then the general manager of Grace's Specialty Vermiculite Unit in Grace's Construction Products Division, that VVL was interested in acquiring Grace's Virginia reserves. (Stip. ¶ 60; DTX 138.) VVL had mined the Purcell property extensively, and needed an additional source of supply to continue its operations in Virginia. (PTX 68, 78; DTX 138.)

92. Mr. Gumble's proposal gave Grace the opportunity to reevaluate its position in Virginia, as well as the costs and benefits of retaining the Louisa County properties without mining them.

93. Grace assessed several problems with its strategy of holding onto reserves to keep them from VVL. (DTX 138; PTX 321.)

94. One of the problems was that retaining the properties without mining them carried costs, such as advanced royalty payments, property taxes, and other expenses. (PTX 321; DTX 138.) As of December 1990, Grace had paid over $1 million in advanced royalties, and estimated it would have to pay at least another $1 million in advanced royalties over the next twenty years. (PTX 301.)

95. Another problem with this strategy was that simply holding onto the properties without mining them did not bring any income to Grace. In the early 1990s, Grace estimated that it would not be profitable to expend the up-front capital required to build a mill and to begin mining operations in Virginia, because the cost would exceed the cash flow from such operations. (PTX 318, 321, 323.)

96. Another problem was adverse publicity, due to HGSI's opposition to mining. (PTX 321.)

97. In addition, the original reason Grace acquired the reserves—to support a number of core businesses that were dependent upon vermiculite—no longer applied. Grace's core businesses no longer relied on vermiculite, and Grace did not think it ever would mine in Virginia. (DTX 138; PTX 321.)

98. Given all of these considerations, it became clear to Grace that the only benefit of retaining the reserves was to keep VVL from acquiring them. (DTX 138; PTX 321.)

**9 . On February 14, 1991, Mr. Poling wrote to his superiors, evaluating these various considerations. (DTX 138.)

100. Mr. Poling was aware at this time that VVL was running out of reserves in Louisa County. He viewed the strategy of keeping Grace's reserves from VVL as benefitting Grace because VVL "could be forced to cease operations" in Virginia if VVL did not obtain additional Virginia reserves. (DTX 138 at G003119.)

101. However, Mr. Poling did not think that keeping the reserves from VVL would help Grace create a monopoly in the North American vermiculite industry, because he saw vermiculite as remaining "readily available to the marketplace from Virginia's sister company Carolina Vermiculite as well as from Palabora and increasingly *568 'new' sources such as China, Brazil, Dillon [Montana], and others." (DTX 138 at G003120-21.)

102. Because Grace had not yet decided how, or whether, to dispose of its Louisa County properties, Mr. Poling advised that Grace further explore Mr. Gumble's proposal. (DTX 138.)

103. Grace and VVL had three meetings to discuss VVL's possible acquisition of Grace's Virginia reserves.

104. The first meeting between Grace and VVL took place on April 25, 1991, at VVL's Purcell property. (Tr. at 307.) Present for VVL were Mr. Gumble, Robert L. Sansom, Ph.D. ("Dr. Sansom"), VVL's general partner, and Dr. Sansom's brother, John C. Sansom, who managed VVL's South Carolina operations. Present for Grace were Mr. Poling and Grace's Manager of Strategic Planning, Michelle Stecyk. (Tr. at 307; PTX 76 at G015571.)

105. At the first meeting, Grace and VVL discussed four options: (1) Grace selling its Louisa County reserves to VVL; (2) Grace leasing or licensing its Louisa County reserves to VVL; (3) combining the vermiculite businesses of both companies into a separate entity; or (4) "doing nothing," which meant that Grace would continue to hold its Louisa County reserves, and VVL would continue to mine its existing reserves. (DTX 2, 134; PTX 70.)

106. Dr. Sansom offered to buy all of Grace's Louisa County reserves for $1.5 million. When the Grace representatives asked if his offer took account of the real estate value of the land, Dr. Sansom acknowledged that it did not, and changed his offer to $1.75 million for the land and the reserves.

107. Grace said it would take the offer under advisement and would schedule a follow-up meeting in June. (DTX 134; PTX 70.) At that time, Grace was assessing its options, but had not yet decided what to do with its properties.

108. In May 1991, before VVL and Grace had their second meeting, Ms. Ely of HGSI went to a Grace shareholder meeting in South Carolina. (Tr. at 1695-99; PTX 470.) At the meeting, Ms. Ely spoke with Grace's chairman, J. Peter Grace, and asked him to consider donating Grace's

Louisa County reserves to HGSI. (Tr. at 1695.) Mr. Grace referred her to Grace's Executive Vice President, Donald Kohnken. (Tr. at 1695.)

**10 9. Mr. Kohnken apparently did not know Ms. Ely and was not aware of Grace's activities in Louisa County. (Tr. at 1695, 1699.) He told Ms. Ely that Grace would contact her after it had considered the matter more fully. (Tr. at 1699.)

110. Mr. Kohnken subsequently asked Mario Favorito, Grace's in-house counsel, to advise him on the matter. (PTX 470.)

111. Mr. Favorito responded by an internal memorandum dated May 24, 1991. It is clear from the memorandum that Mr. Favorito had not thought about the mining situation in Louisa County for some time. He opined, based on his experience with Ms. Ely in the 1970s, that Ms. Ely still wanted Grace not to mine its reserves and, instead, wanted the company to donate its land for preservation and tax purposes. He made tentative recommendations, such as "politely declin[ing] any invitation to place preservation easements on the Green Springs property at this time." Mr. Favorito also attached a memorandum from Mr. Poling that indicated VVL was interested in acquiring the right to mine Grace's reserves. (PTX 471.)

112. It appears that it was by Mr. Favorito's memorandum that Grace's principal decision-makers—who included Mr. **569 Grace; J.P. Bolduc, Grace's President; Robert C. Walsh, a senior Grace officer; and Mr. Kohnken—first were made aware that VVL and HGSI were seeking simultaneously to obtain Grace's Louisa County reserves.

113. In June 1991, Mr. Poling drafted an internal memorandum assessing the costs and benefits of the four options he discussed with VVL at the first meeting. (PTX 303.)

114. Mr. Poling viewed the first option—selling to VVL—as having the benefit of eliminating Grace's carrying costs and generating immediate cash for Grace. Mr. Poling estimated that if the reserves and properties were sold for $2.2 to 3 million, Grace's aftertax income would be $1 to $1.4 million. Mr. Poling saw the obvious disadvantage of this option: It would "provide[ ] [Grace's] competitor with [a] reserve base." (PTX 303 at 010427.)

115. Mr. Poling viewed the second option—leasing to VVL—as having the advantages of providing Grace with an annual income stream and allowing it to retain ownership over the reserves, but the risk that Grace would assume liability for VVL's mining activities. (PTX 303 at 010427.)

116. Mr. Poling viewed the third option—combining the two companies' vermiculite businesses—as having the advantage of maximizing Grace's vermiculite assets, but the disadvantages of being complicated, having a low likelihood of success, and carrying antitrust risks. (PTX 303 at 010427.)

117. Mr. Poling viewed the fourth option—"doing nothing"—as having the advantage of "effectively removing these reserves from the system," (DTX 138 at G003121), thereby "keep[ing] Virginia Vermiculite from gaining needed reserves," (PTX 303 at 010427), but the disadvantage of not maximizing the value of the property, since Grace most likely would not mine it. (PTX 303 at 010427.) To assess the viability of this option, Mr. Poling estimated that Grace would gain up to $1.5 million in business, over twenty years, if VVL ran out of reserves in Louisa County by 1995. (PTX 303 at G010432.)

**11 118. However, Mr. Poling did not at this time think that *not* selling or leasing to VVL would limit VVL's access to reserves in the short term, because VVL had access

to ample reserves in South Carolina. Mr. Poling viewed VVL as "under capacity" in South Carolina. (DTX 135; Poling Dep. (Nov. 20, 1997) at 373-78.)

119. Mr. Poling recommended that Grace pursue the first option, selling to VVL. He estimated the value of Grace's reserves to be $2 to 3 million. (PTX 303 at 01427, 01429.)

120. Mr. Poling's memorandum did not address what had become, since the first meeting, a fifth option: donating the properties to HGSI.

121. The second meeting between Grace and VVL took place at Grace's headquarters in Cambridge, Massachusetts, on July 8, 1991. Present for VVL were Dr. Sansom and Mr. Gumble. Present for Grace were Messrs. Poling and Favorito, and Ms. Stecyk. (Tr. at 613.) The parties again discussed the four options raised at the first meeting and addressed by Mr. Poling's memorandum. (Tr. at 613-31.) Grace indicated it was not interested in leasing reserves to VVL or in creating a joint venture with VVL, leaving the only remaining options as "sell to VVL" or "do nothing." (PTX 305; Tr. At 616, 622.) Mr. Poling also mentioned to VVL that Ms. Ely had approached Grace with another option, namely, that Grace donate its properties to HGSI. (PTX 305; Tr. at 615.)

**570 122. As the second meeting was drawing to a close, the Grace representatives handed Dr. Sansom and Mr. Gumble a letter detailing Grace's counter-offer. (DTX 3; Tr. at 628.) Essentially the letter said that Grace would consider selling VVL the mining rights to Grace's Louisa County properties for $2.1 million, and the land itself for its appraised value. (DTX 3.)

123. At this time, Grace calculated the total amount of acreage it owned to be 1076 acres, (DTX 3), and estimated the market value of the land to be approximately $1000 per

acre. (PTX 312 at 010439.) Therefore, the total market value of Grace's Louisa County real estate, independent of mining rights, was approximately $1 million. (PTX 77 at G15818.)

124. The parties considered Grace's total counter-offer to be $3 to 3.5 million for the land and the reserves, (Tr. at 638; DTX 137; PTX 71), as compared to Dr. Sansom's original offer of $1.75 million.

125. After the second meeting, VVL and Grace entered into a confidentiality agreement ("Confidentiality Agreement") so that VVL could view Grace's mining leases and other relevant documents, to make an informed counter-offer. (DTX 4, PTX 72.)

126. The fact that Grace allowed VVL to inspect Grace's confidential documents indicates that Grace was pursuing the negotiations in good faith.

127. Dr. Sansom attempted to calculate the value of Grace's holdings—and an appropriate response to Grace's counter-offer—based on the information he received pursuant to the Confidentiality Agreement. (Tr. at 632-38.)

128. The third and final meeting between Grace and VVL took place in Cambridge, on September 17, 1991. Present for VVL was Dr. Sansom. Again present for Grace were Messrs. Poling and Favorito, and Ms. Stecyk. (Tr. at 631, 639, 641.)

**129 129. Having seen Grace's leases and, in light of his revised calculations, Dr. Sansom again offered Grace a total of $1.75 million to purchase Grace's Virginia mining rights and land. (Tr. at 641-42.) Although VVL was willing to pay up to $2.2 million, Dr. Sansom understandably did not communicate this amount to Grace. (Tr. at 643.)

130. The Grace representatives were non-responsive. Based on their demeanor at the meeting, Dr. Sansom suspected that Grace was negotiating with VVL simply to

set a value on the properties for the purpose of determining the deductibility of a donation to HGSI, and that Grace at this time was not genuinely interested in reaching a negotiated agreement with VVL. (Tr. at 639, 641.)

131. While the court does not doubt the sincerity of Dr. Sansom's belief, objective evidence indicates that selling to VVL remained a possible option for Grace through July 1992, and that Grace had not yet decided whether to donate its properties to HGSI. (*E.g.*, PTX 312.) Moreover, no evidence was presented that Ms. Ely or HGSI had any influence or effect on what, during this period of time, appears to have been an entirely internal assessment by Grace of its various options.

132. The Grace representatives' non-responsiveness likely was due, instead, to their perception that Dr. Sansom's newest offer of $1.75 million was even less than his original offer of $1.75 million, because Dr. Sansom added conditions to his new offer that made it less attractive than the original offer. (DTX 133, 137; PTX 14 at 14379, 312 at 010439, 323; Bettacchi Dep. (Dec. 3, 1997) at 116).) For example, Dr. Sansom indicated that he wanted the purchase **517 price to be reduced by $350,000—to $1.4 million—if VVL was unable to obtain a conditional use permit to mine the properties within twelve months. (DTX 137; Tr. at 638-39.)

133. Grace interpreted Dr. Sansom's newest offer to indicate that VVL was unable or unwilling to increase its offer above $1.75 million. Grace accordingly decided further negotiations would not be productive. (DTX 7, 137.)

134. Dr. Sansom's firm negotiating position was the principal cause of the failed negotiations between Grace and VVL.

135. The negotiations with Grace having proved unsuccessful, VVL decided to attempt to acquire reserves from other sources.

136. In 1991, of the vermiculite concentrate sold in North America, Grace sold approximately 47% (86,157 tons), VVL sold 30% (17% (30,423 tons) from its Virginia division, and 13% (23,432 tons) from its South Carolina division), and foreign imports accounted for approximately 23% (40,783 tons). (Table 1.)

137. As of January 1992, Grace had not yet decided how to dispose of its Louisa County properties. A report dated January 13, 1992, reevaluated Grace's estimates of the Nininger reserves, and attempted to verify the accuracy of Grace's twenty-year-old reserve data. (PTX 306.)

138. On April 25, 1992, VVL leased Brandy B from Brandy, Ltd. (Stip. ¶ 63.)

**13 139. VVL could not begin mining Brandy B until it acquired a permit to do so from the Louisa County Board of Supervisors. (Stip. ¶ 64.)

140. In May 1992, Ms. Ely attended Grace's annual shareholder meeting in Florida. (Stip. ¶ 65.)

141. No evidence was presented that Ms. Ely communicated with Grace between May 1991 and May 1992, and Ms. Ely denied having done so. (Tr. at 1699.)

142. At the shareholders meeting, Ms. Ely met with Mr. Kohnken, among others, and attempted to persuade Grace to abandon any plans to mine in Louisa County. (Stip. ¶ 66.)

143. Mr. Kohnken charged Mr. Walsh, a senior Grace officer, with the responsibility of developing a response to Ms. Ely. (Stip. ¶ 67.)

144. This appears to have been Ms. Ely's first indication that Grace, after two decades, finally may have been interested in pursuing a donation.

145. Ms. Ely had developed an "intense interest" in the vermiculite industry since the 1970s. (Ely dep. (Apr. 14, 1999) at 430.) She became extremely knowledgeable about the geography and history of the Louisa County area; the vermiculite industry; how to lobby politicians in the local, state, and federal governments; which mining companies owned what properties; which properties did or did not have conservation easements; when the companies were applying for rezoning permits; and when certain properties were, or were about to be, transferred to a mining company. (*E.g.*, PTX 120 at H0046, 441; Tr. at 1646-95; 1743; 1799-1804.)

146. Ms. Ely's intense interest in and knowledge of the vermiculite industry and Louisa County affairs raise the inference that, at least by May 1992, Ms. Ely realized VVL only controlled the Purcell reserves and had leased the Brandy B property to replenish its depleting reserves.

147. The conjunction of VVL's depleting reserve situation with Grace's newfound interest in donating its properties presented, for the first time, the real possibility that Grace would leave Virginia and that VVL could run out of reserves in Virginia.

***572** 148. Because of these unusual circumstances, a well-timed donation could fulfill what Ms. Ely testified had been her goal "since October . . . 1972," namely, the elimination of all vermiculite mining in Virginia. (Tr. at 1897.)

149. To take advantage of this opportunity, Ms. Ely began to take control of the HGSI organization.

150. Ms. Ely called an HGSI board meeting on June 11, 1992. She reported that VVL was planning to expand its

operations, and that HGSI's goal should be "to get rid of all vermiculite mining." Ms. Ely also said she was ready to assume the presidency of HGSI. (PTX 94.)

151. Except in one instance, Ms. Ely was the only HGSI member to communicate with Grace. (Tr. at 1571-74.)

152. Some of the members began to express dissent that the organization was being dominated by Ms. Ely, was dividing into factions, and was operating in too much secrecy. (PTX 96.)

153. On June 26, 1992, Ms. Ely was elected President of HGSI, with Roberta W. Patton as Vice-President.

**14 154. In the fall of 1992, over a dozen HGSI members wrote a letter to Ms. Ely, objecting that she operated the organization in "an increasingly undemocratic" manner. (PTX 121.) Ultimately, Ms. Ely effectuated the dissolution of HGSI's membership, and the members were limited to HGSI's five board of directors. The board, which Ms. Ely headed, was to be "self-perpetuating." (PTX 107.)

155. As of mid-1992, Grace still had not decided how to dispose of its property. (PTX 312; DTX 133.)

156. On July 29, 1992, Mr. Poling prepared charts summarizing the options Grace was considering at that time. Those options included: (1) selling the properties for a non-mining use (thus maintaining the mineral rights) to potential buyers, such as private parties, Ms. Ely or HGSI, the National Park Service, or "Shenandoah Crossing," a time share development abutting the Grace properties; (2) donating the land to HGSI, thus receiving a charitable donation tax treatment; and (3) selling or leasing the reserves to VVL. (PTX 312 at 010439, 010450.)

157. Grace viewed the first two options as more viable than the third, as Mr. Poling's charts qualified the third option by the statement, "Discussions were held with Virginia Vermiculite in the summer of 1991 and terminated in September when they added conditions to their initial $1.75 million offer, effectively reducing the deal to an unacceptable level." (PTX 138 at 010439. *See also id.* at 010450 (listing VVL as a potential buyer, but noting that "[p]revious negotiations terminated September 1991").)

158. Grace was aware that VVL was running out of reserves, (PTX 312 at 010439), and "expected [VVL] to exit the market due to a shortage of reserves, [although] ongoing efforts to find reserves may extend [its] capability for several years." (PTX 76 at G015522.)

159. However, Grace also considered the vermiculite industry to be in an "overcapacity situation," and was concerned that "potential new suppliers . . . will only . . . continue the downward price pressure on VCX," Grace's vermiculite concentrate product. (PTX 76 at G015518.)

160. As of July 1992, Grace viewed itself as having a "strong yet declining share of the vermiculite concentrate market," (PTX 76 at G015512), and it perceived Palabora as being "the largest and most profitable vermiculite producer," that "dominat[ed] the industry" with its "'benchmark' product quality," "full range of concentrate sizes," "full product line," *573 "excellent yields," and "high purity." (PTX 76 at G015524-25.) Although Palabora had nearly twice Grace's costs, due to transatlantic shipping costs, Grace estimated that Palabora's gross profit was over twelve times greater than Grace's gross profit. (PTX 76 at G015523.)

161. In his July 29, 1992 charts, Mr. Poling recommended that Grace sell the real estate of its owned properties, but retain the mining rights, in order to "reduce [ ] capital," to "provide[ ] income/cash flow from the sale,"

and to "maintain[ ] [Grace's] defensive competitive posture." As for the leased properties, Mr. Poling recommended that Grace "[c]ontinue to pay minimum royalties for two (2) years . . . to allow time to assess Virginia Vermiculite's ability to continue to operate." (DTX 133 at G003189; PTX 312 at 0104340 (emphasis added).)

162. Mr. Poling's July 1992 recommendation differed from his June 1991 recommendation (*i.e.*, to sell to VVL), in that he now was focused more definitely on maintaining a defensive posture with respect to Grace's reserve base. Further, he now perceived VVL's ability to operate as being relevant to Grace's ability to maintain that defensive posture.

163. In August 1992, Mr. Walsh inquired of Mr. Poling how much Grace's vermiculite business would benefit from VVL closing in Virginia due to a lack of reserves. Consistent with his June 1991 memorandum, Mr. Poling responded that Grace's business would benefit by a net present value of $1.5 million. Mr. Walsh also asked how much VVL's vermiculite business would benefit if VVL obtained Grace's Virginia reserves. Mr. Poling responded that VVL likewise would benefit by $1.5 million. (PTX 313 at G003239; Walsh Dep. (Dec. 1, 1997) at 110-13; Walsh Dep. (Dec. 2, 1997) at 47-48.)

164. As of August 1992, Ms. Ely knew that VVL was applying for a permit to mine the Brandy B property, and was concerned that VVL would expand its operations across Route 22. (PTX 120.)

165. Ms. Ely previously had told Mr. Gumble that VVL could precipitate "World War III" if it crossed Route 22. Other landowners had described Route 22 as "the Maginot line." (Tr. 282.)

166. Mr. Walsh visited Louisa County on September 1 and 2, 1992. (PTX 320.) While there, he met with Ms. Ely

and Ms. Patton of HGSI. He also met with Tyson Van Auken of the Virginia Outdoors Foundation, another local preservationist group, to discuss the practicalities of including conservation easements and restrictive covenants with a land donation. (PTX 320; Tr. at 1703-08.) Mr. Walsh and Ms. Ely had continued discussions thereafter. (PTX 320.)

167. At the September 1992 meeting, Ms. Ely raised the subject of VVL's pending application to mine Brandy B with Mr. Walsh. (Tr. at 1705.)

168. Mr. Van Auken testified that he did not recall discussing VVL at his meeting with Mr. Walsh; therefore, Mr. Van Auken either forgot the discussion, or Mr. Walsh and Ms. Ely discussed VVL outside of Mr. Van Auken's presence.

169. It was at this point—in September 1992—that Grace and HGSI decided that their common interest would be served by VVL going out of business in Virginia, and that this goal could be accomplished by Grace donating its properties to HGSI, with restrictive covenants that would prohibit any future mining.

170. Grace viewed donating to HGSI as a solution to the problems associated with its strategy of retaining the reserves to keep them from VVL. By donating to an antimining organization that would agree **574 to far-reaching restrictions on mining, Grace could eliminate its carrying costs and related expenses, and yet continue to prevent VVL from acquiring those reserves.

171. In notes dated September 1, 1992, Mr. Walsh described Grace's goals as follows:

> 1. Eliminate future outlays of $1.1 million
>
> 2. Maximize the benefits relating to past outlays

**16 3. Keep Virginia Vermiculite from improving its competitive position

4. Cooperate with goals of Green Springs District.

(PTX 317.)

172. Mr. Walsh also wanted to find out "where . . . things stand on Virginia Vermiculite plans and Green Springs['s] attempts to stop Virginia." (PTX 317.) As these notes were written on September 1, he presumably was going to find out where those plans stood during his meeting with Ms. Ely the following day.

173. Ms. Ely denied that Mr. Walsh indicated a donation would serve to injure VVL. (Tr. at 1706.)

174. On September 9, 1992, Lee P. Hackett, who worked for an appraisal company, had a telephone conversation with Margaret Sheehan, one of Grace's tax attorneys with whom Mr. Walsh had been working, (PTX 321), in which Ms. Sheehan communicated that "Grace is considering a charitable donation, as long as there is some protective clause against allowing any Grace competitor, at any future time, to conduct mining operations." (PTX 450.)

175. Meanwhile, as noted *supra*, VVL was planning to apply for a permit to mine the Brandy B property. VVL realized it would have to transport any ore mined at Brandy B to be processed at the Purcell property. VVL was concerned that if it had to use trucks to transport the ore over the public road (Route 22), the disturbance might provide the Louisa County Board of Supervisors with a basis for denying its application. (PTX 14.)

176. On September 10, 1992, Mr. Gumble telephoned Mr. Poling. Perhaps unwisely, Mr. Gumble informed Mr. Poling of the above concerns and told him that VVL's permit more likely would be granted if it could transport the

ore "off road." He therefore asked Mr. Poling whether Grace would consider building a road and bridge (across the South Anna River) on Grace's M.F. Peers River Property, and whether Grace would sell VVL an easement over the same. (PTX 14; Tr. at 356-59.)

177. Mr. Gumble's notes of his conversation with Mr. Poling indicate that Mr. Poling did not think Grace would agree to such an easement, and wondered why Grace would help its competitor. (PTX 14; Tr. at 195-96.)

178. In addition, Grace's plans with HGSI already were underway, so Grace no longer had any interest in selling its properties or any easements to VVL.

179. On September 17, 1992, Mr. Walsh wrote an internal memorandum to Mr. Kohnken, in which Mr. Walsh summarized his findings concerning Grace's properties in Louisa County. The memorandum provides considerable insight into Grace's intent and into its cooperation with HGSI in the months preceding the donations. In substantial part, the memorandum reads:

> It is clear to me that it is extremely unlikely Grace will ever mine vermiculite in Virginia as the vermiculite business is less important strategically today, we have adequate reserves in South Carolina, and the economics of investing capital to develop a mining and milling operation are poor. Yet to continue our strategy of keeping the reserves out of the hands of an adjacent competitor (desirable) involves future annual lease payments and taxes that cumulatively amount to about $1.1 million pre-tax over the next twenty years.

**17 Rae Ely's pitch for twenty-years [sic] has been for Grace to donate its owned land and leased vermiculite rights to Green Springs Historical Inc. [sic] and take a charitable donation . . . .

With all of this in mind, I met with Rae Ely and other interested parties . . . .

In general, the results of that meeting are that the people I met with are quite interested in . . . . . .

[a]ccept[ing] ownership of our land . .

. . [and] . . . [a]ssum[ing] the obligations under our – mineral lease agreements, including the future annual payments (thereby keeping the reserves off the market). . . .

Since my visit to Green Springs on September 1 and 2, I have been . . . continuing conversations with Rae Ely.

While this assessment of the situation has been going on, our competitor, Virginia Vermiculite, who mines on adjacent properties, has filed for new mining permits to open up some new reserves under lease to them. Rae Ely and friends are determined to take on Virginia Vermiculite in what she labels as "the war of all holy wars". Their war with Virginia Vermiculite and its owner, Robert Samson [sic], has been going on for years.

In the past few days, she informed me that her group has discovered the unreported use of some chemicals, the presence of some oil spills, and the washing out of drums on

Virginia Vermiculite's property. She intends to bring the State down on them. . . . (In past conversations, she has talked about bringing the issue of asbestos contamination of vermiculite in Virginia into this arsenal of arguments. I think I have convinced her that is not a good idea.)

Since the hearing on the mining permit is scheduled for October 8, Ely and company plan to begin their "war" on Friday, September 25. She believes, as I do, that Grace will benefit from an announcement a couple days ahead of their launching their fight and could come out less positively by announcing after. . . .

I believe we should get the long-standing issue behind us, avoid the future expenses, and get the favorable P.R. value.

On the other hand, there are property owners who have vermiculite deposits who consider Ely to be a meddling devil. Also, Virginia Vermiculite may argue that Grace and [HGSI] have cooperated to their detriment. . . .

So, there is also the possibility of some adverse reaction. . . .

. . . Because of the new development at Virginia Vermiculite, I propose we proceed and make our announcement next week . . . .

(PTX 321.)

180. The next day, on September 18, 1992, Ms. Ely faxed Mr. Walsh a list of chemicals purportedly used in VVL's mining operations. (PTX 322, 349; Tr. at 2047- 53.)

181. On cross-examination, Ms. Ely attempted to deny that she had done so, until it was pointed out that the facsimile date and time stamp on the top of her personalized cover sheet matched the date and time stamp on the top of the attached list of chemicals, which proves that HGSI sent Mr. Walsh the list of chemicals on the date indicated. (Tr. at 2047-51.)

**18 182. Ms. Ely faxed Mr. Walsh the list of chemicals to identify possible ways in which VVL might have violated environmental laws. (PTX 322, 349.) Ms. Patton of HGSI acknowledged on cross-examination that she "c[ould]n't think of any legitimate reason [HGSI] would be talking to Grace about environmental problems at Virginia Vermiculite's facility." (Tr. at 1613.)

183. During at least one of Mr. Walsh's conversations with Ms. Ely during this period, they discussed "coordinat[ing]" a "meticulous time line." (PTX 349; Walsh Dep. (Dec. 2, 1997) at 39-41.)

184. The timing of the donations was important to both Grace and HGSI, because both knew that VVL was running out of reserves, and hoped that the donations would prevent VVL from acquiring the reserves it needed to stay in business in Virginia.

185. Grace prepared a list of Louisa County landowners to contact prior to the making of the donations. The list included the M.F. Peerses, the A.D. Peerses, the Niningers, and Ann Hill Granger, the owner of the Brandy properties and daughter of the Hills. Grace noted that the Peerses were "entitled to royalties if [the property is] mined," and that the Niningers and Hills received annual advanced royalties. Grace recognized that because these individuals expected their properties to be mined, donating the properties to an anti-mining organization carried the potential disadvantage of "legal action." (PTX 351.)

186. In mid- to late September 1992, Mr. Poling called M.F. Peers to arrange for a tour of the M.F. Peers property, and M.F. Peers provided a tour to Mr. Poling and Ms. Stecyk. When M.F. Peers asked why they wanted a tour, Mr. Poling said that Grace was evaluating what to do with the property. M.F. Peers told him Grace either should mine it or sell it to someone who would mine it. (Tr. at 538-39.)

187. Mr. Poling told M.F. Peers that he thought the property might be mined, (Tr. at 538), and did not mention that Grace was planning to donate the property to HGSI. (Tr. at 539.)

188. Before the donations were announced, Grace knew that donating the properties to HGSI would foreclose the possibility that the properties would be mined, and that, therefore, the donations would harm property owners such as the Peerses, to whom Grace had promised "per ton" mining royalties.

189. Ms. Ely also knew that the donations would harm property owners such as the Peerses. Grace sent Ms. Ely copies of its lease and mining agreements with the various Louisa County landowners on September 23, 1992. (PTX 324.) Ms. Ely admitted on cross-examination that she "knew that [the M.F. Peerses] had a financial interest in having their former property mined," (Tr. at 2077); that imposing restrictive covenants not to mine was more injurious to the Peerses than if Grace simply retained the properties without mining them, as the restrictive covenants prevented the properties from being mined, (Tr. at 2078); and that she was sure the Peerses were "very unhappy" when they learned about the donations to HGSI. (Tr. at 2073.)

**19 190. On September 28, 1992, Ms. Ely wrote to Mr. Walsh. In her letter, she emphasized that "[t]he long-term successful accomplishment of our joint and several goals is most probably met by maintaining the Grace/HGSI cooperative undertaking." She stated that "[a]ny control put

in the hands of third parties with unknown agendas will at best dilute and at worst defeat the original objectives," and recommended that any third parties be informed "that a *577full agreement with HGSI was reached 7 to 10 days ago." (PTX 326.)

191. The only "joint" goal that Grace and HGSI shared was VVL going out of business in Virginia.

192. At trial, Ms. Ely attempted to explain that she wrote the letter because she apparently received a call from someone in the office of the Governor of Virginia who said that the Governor called Mr. Bolduc to request that Grace not make the donation to HGSI. Ms. Ely testified that this was "one of the most surprising and . . . upsetting phone calls . . . [she had] ever received," but, incredibly, that she could not remember the name of the person who called her. (Tr. at 1744.)

193. At 8:00 a.m. on September 29, 1992, Mr. Poling unexpectedly called M.F. Peers, and said he was coming to the M.F. Peerses' residence. (Tr. at 542-43.)

194. Mr. Poling arrived, showed the M.F. Peerses a press release, and informed them that Grace was announcing a donation of all its Louisa County land to HGSI.

195. M.F. Peers and his wife were upset that the properties were being donated to HGSI, because they never had been paid royalties for their vermiculite. (Tr. at 543.)

196. Mrs. Peers "jumped up and down and said that was the lowest thing she had ever heard of." (Tr. at 543.)

197. Later that day, Grace issued a press release announcing it was donating all of its Louisa County interests to HGSI. (Stip. ¶ 68; PTX 327.)

198. In 1992, before its donations to HGSI, Grace controlled (either by lease or ownership) reserves in Louisa County that it estimated to be equal to 1,520,000 tons of vermiculite concentrates. (Stip. ¶ 19.)

199. In early October 1992, VVL made a presentation at a Louisa County Planning Commission meeting concerning VVL's application for a permit to mine the Brandy B property. At the meeting, Mr. Gumble and Dr. Sansom made clear that VVL needed to mine the Brandy property to stay in business in Virginia, due to the depletion of the Purcell reserves. Ms. Ely was present at the meeting, and therefore, was aware of VVL's depleting reserve situation, at the latest, by this date. (PTX 68, 78; *Cf.* Tr. At 2010.)

200. Pursuant to a provision in the original 1973 Agreement between the A.D. Peerses and Grace, the A.D. Peerses had the option of buying back the 37-acre Parcel A in the event that Grace "resold" the property. (Stip. ¶ 88.)

201. On October 16, 1992, the A.D. Peerses wrote to Grace, stating that because Grace was not going to mine the property, they wished to exercise their right to buy back Parcel A. (PTX 330.)

**20 202. The A.D. Peerses sought to buy back Parcel A to sell or lease it to a third party that would mine it, so that they could receive mining royalties.

203. On October 27, 1992, Grace responded, assuring the A.D. Peerses that it had not yet finalized plans to donate their properties to HGSI. Grace informed them that they therefore could not yet buy back Parcel A. (PTX 329, 332.)

204. Contrary to its representations to the A.D. Peerses, Grace already had decided by this time to donate the A.D. Peers properties to HGSI, and to include restrictive covenants not to mine in the deeds of gift; Grace's press release spoke of Grace's intent to donate all of its interests in

Louisa County, and the original drafts of the 1992 donation deeds included the A.D. Peers properties among the **578 donations subject to the written restrictive covenants. (Stip. ¶ 93.)

205. It was only after receiving the A.D. Peerses' October 27 letter that Grace was reminded of the buy-back provision, and made aware that donating the A.D. Peers properties to HGSI could result in VVL obtaining Parcel A.

206. On November 10, 1992, Mr. Walsh wrote an internal memorandum to Mr. Poling, suggesting that Grace and HGSI enter into an understanding to withhold the A.D. Peers donation, as a delay might prevent VVL from replenishing its depleting reserves. (PTX 331.)

207. Grace was concerned that if it donated the A.D. Peers property to HGSI, the donation might constitute a "sale," giving A.D. Peers the option of buying back Parcel A. Grace and HGSI, as evidenced by HGSI's ultimate agreement to delay the donation, were aware that VVL was depleting its reserves; that Parcel A might contain up to 250,000 tons of vermiculite; that A.D. Peers likely would sell Parcel A to VVL; and that if VVL obtained Parcel A it could continue mining in Virginia for an additional five to six years. (PTX 331, 402.)

208. Therefore, Grace and HGSI entered into an understanding to delay the A.D. Peers donation, pending the outcome of the Brandy permitting process. Grace and HGSI thought that if the Brandy B permit restricted the amount of reserves that could be mined, a multi-year delay of the A.D. Peers donation could assure that VVL not mine Parcel A, and thus, could lead to VVL going out of business in Virginia. On the other hand, Grace and HGSI thought that if the Brandy B permit did not restrict the amount of reserves that could be mined, a multi-year delay would not be helpful because VVL would remain in business in Virginia even if it did not obtain Parcel A. (PTX 331.)

209. Ms. Ely denied that she intended the delay to injure VVL. (Tr. at 1765.)

210. On November 13, 1992, A.D. Peers wrote a letter to Grace, expressing relief at Grace's assurances that it had not yet had definitive discussions with HGSI about the donations. Grace decided not to respond to A.D. Peers until it determined whether VVL's Brandy B permit carried enough restrictions to make a delay of the A.D. Peers donation worthwhile. (PTX 332.)

**21 211. On November 18, 1992, Ms. Ely wrote to Mr. Favorito saying it would be in "everyone's interest" if Grace conveyed the M.F. Peers River Property and the Brandy properties to HGSI prior to the hearing, "since doing so will produce the maximum benefit." (PTX 431.)

212. The court finds Ms. Ely's reference to Grace and HGSI sharing an interest to be probative of their joint intent that VVL deplete its reserves in Virginia.

213. Ms. Ely testified, remarkably, that, in using the phrase, "everyone's interest," she did not mean to include Grace in the term "everyone," even though Grace was the party to whom she addressed the letter. (Tr. at 2068.)

214. On November 30, 1992, Grace began transferring its Louisa County properties to HGSI, with the exception of the A.D. Peers property. (Stip. ¶ 69.)

215. On that date, Grace conveyed two properties to HGSI by a single quit claim deed of gift. (Stip. ¶ 70.) One of those properties was M.F. Peers Parcel II, the River Property located between VVL's Purcell and Brandy B properties.

216. Around the same time, VVL was scheduled to appear at a hearing on its application for a permit to mine Brandy B. *579 (Stip. ¶ 71.)[1]

217. Grace donated the M.F. Peers properties to HGSI in furtherance of its own interest, and with intentional disregard of the financial interest of the M.F. Peerses.

218. The November 30, 1992 deed contained the following restrictive covenants:

> 1. No part of the Real Estate shall ever be used or operated for the purpose of Mining or Mineral Production. The phrase "Mining or Mineral Production," as used herein, shall include, but shall not be limited to, the following:
>
> > a. The extraction, removal or relocation of ores, minerals, stone, gravel and soils (including, but not limited to, vermiculite), regardless of whether or not such material is under, on or above the surface of the Real Estate;
> >
> > b. Auger mining, underground mining, strip mining, open pit mining, quarrying, blasting, digging, hydraulic mining, dredging,

---

1 The court includes this as a finding of fact only because the parties stipulated to it as such. However, the only inference to be drawn from this fact is that HGSI and Grace, in concert, timed the donation to give HGSI greater standing to oppose VVL's Brandy B permit at the Louisa County Board of Supervisors meeting in December 1992 (as indicated in PTX 333). The court does not herein draw that inference or otherwise rely on this stipulated fact, because even "an 'anticompetitive purpose [does] not illegalize' concerted attempts to influence public officials." *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 398 (4th Cir. 2001) (quoting *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669 (1965)).

tunnel mining, deep mining, surfact [sic] mining, placer mining, longwall mining, and any other method of mining not mentioned herein which has been practiced, which is currently practiced or which may be practiced at any time in the future.

2. The Restrictive Covenants shall apply notwithstanding any attempt, whether successful or not, at restoration of the Real Estate through the process of reclamation or any other method which restores the Real Estate to the state in which it existed prior to Mining or Mineral Production.

3. No excavation or grading may be made on the Real Estate except for walls, footings, basements, or cellars which such excavation or grading shall be solely incidental to the erection and construction of residential and agricultural structures on the Real Estate.

4. The Real Estate shall be used solely for agricultural and residential purposes. Digging or plowing incidental only to residential or agricultural purposes shall be permitted.

**22 5. Grantor [Grace] covenants and agrees, for itself, its successors in title and interest, and its assigns, that the Restrictive Covenants shall run with the land forever.

(PTX 53; Stip. ¶ 72.)

219. These restrictive covenants were included on all of the donated properties, and similar provisions were included in the assignments of Grace's leases. These

covenants had the purpose of preventing VVL from mining the properties and from using the properties to transport its vermiculite ore, in the event that VVL ever found itself in a position to do so.

220. For example, in prohibiting "[t]he extraction, removal or relocation of ores, minerals, stone, gravel and soils (including, but not limited to, vermiculite), regardless of whether or not such material is under, on or above the surface" of the M.F. Peers **580 River Property, Grace and HGSI intended to prevent the transportation of any vermiculite across the property, whether the vermiculite was mined from within or without the property. In particular, Grace and HGSI intended to prevent VVL from ever transporting the vermiculite VVL eventually would mine at Brandy B across the M.F. Peers property to VVL's mill at the Purcell property.

221. Ultimately, however, the restrictive covenants were not a material cause of VVL not being able to transport ore across the M.F. Peers property, because it was not proven that Grace or HGSI would have allowed such transportation even if there were no restrictive covenants on the M.F. Peers property.

222. Nor was it proven that Grace would have sold its Virginia reserves to VVL, even if Grace ultimately had not donated the properties to HGSI with the covenants not to mine. Although Grace initially considered selling its properties to VVL, such a sale was simply one of several tentative options Grace was evaluating to determine whether to dispose of its properties. (DTX 2, 134; PTX 70, PTX 312 at 010439, 010450.) At no point did Grace ever commit to selling to VVL. But for the donations to HGSI, Grace would have been in the position it was in before it decided to make the donations. A preponderance of the evidence did not establish that Grace would have chosen the option of selling to VVL over the other possible options. In

fact, there is evidence that suggests Grace would *not* have sold to VVL if donating to HGSI had not been an option. Forexample, while selling to VVL would have brought Grace immediate income and cash flow, Grace had other interests besides immediate income and cash flow; it was interested in sustaining the viability of its own vermiculite business, keeping VVL from reserves, and enhancing its public image, none of which could be accomplished by selling its reserves to VVL. Moreover, Grace was cognizant of the obvious business disadvantages of selling its reserves to one of its principal competitors. (*E.g.*, DTX 135, 138; PTX 14, 312.)

223. On December 2, 1992, Mr. Poling wrote to M.F. Peers, ostensibly to keep him informed of the donations. Although the M.F. Peers River Property already had been transferred to HGSI, Mr. Poling told M.F. Peers that Grace was intending to transfer the River Property "this week." (PTX 43.)

**23 224. On December 7, 1992, the Louisa County Board of Supervisors convened a hearing on VVL's application for a conditional use permit to mine Brandy B. (DTX 9.)

225. Ms. Ely was present at that hearing. (Stip. ¶ 73; DTX 9 at 15.)

226. The Board of Supervisors staff report recommended approving the permit, commenting that the proposed use was allowable in an industrial district, and that the public health and safety would be maintained by the conditions of the permit and by the requirements of state and federal regulatory agencies. (DTX 9 at 15.)

227. Ms. Ann Hill Granger spoke in support of the permit. She said she was a preservationist, but that vermiculite was similar to a crop raised on any other farm. (DTX 9 at 16.)

228. Dr. Sansom and Mr. Gumble also spoke in favor of the permit, explaining VVL's mining operations and the commercial benefits of vermiculite. Mr. Gumble said VVL would use trucks to transport the ore mined at Brandy to the processing mill at Purcell, along a one-half mile stretch of Route 22. (DTX 9 at 15-16.)

229. Ms. Patton spoke against the permit, citing concern about the monitoring of **581 chemicals and contaminants in the ground and water.

230. Ms. Ely also spoke against the permit, saying she thought VVL had not complied with its original conditional use permit for the Purcell property. Ms. Ely requested that the Board of Supervisors conduct traffic and groundwater studies before it made any decision. She also "urged the Board to require a shuttle lane from the [Brandy] property to the Purcell property." By a "shuttle lane," Ms. Ely meant some type of offroad transportation route. (DTX 9 at 21.)

231. From Ms. Ely's request that the permit be conditioned on the availability of a shuttle lane, an inference is raised that Ms. Ely made such a request because, as the owner of the intervening M.F. Peers River Property, she thought she could prevent a shuttle lane from being built.

232. The Board of Supervisors deferred its decision and asked Ms. Ely and VVL to negotiate towards keeping the truck traffic off of Route 22. (DTX 9 at 21.)

233. The next day, Dr. Sansom wrote to the Board of Supervisors stating that VVL was willing to engage in negotiations to secure an easement across the M.F. Peers River Property, to prevent on-road haul of the ore that would be mined at Brandy. Dr. Sansom noted that VVL probably would have to haul on Route 22 for a significant period in any event. He stated that even if such an easement were agreed to, crossing the South Anna River likely would require a permit from the U.S. Army Corps of Engineers,

which regulates wetlands. Dr. Sansom indicated that the property owner, *i.e.* HGSI, would have to begin the process of obtaining such a permit, and that the permitting process could take up to a year to complete. Dr. Sansom concluded by saying that a prompt decision by the Board of Supervisors was "essential to [VVL's] plans." (DTX 10.)

234. Dr. Sansom placed Mr. Gumble in charge of the negotiations for VVL, and instructed him to contact Ms. Ely. (DTX 10 at 2.)

****24** 235. On December 12, 1992, HGSI held a board meeting at which the members discussed receiving the River Property deed, and spent several hours reviewing the proposed deeds and lease assignments for the remaining properties. However, the issue of off-road transportation over the River Property was not discussed, which raises the inference that Ms. Ely did not inform the HGSI board of the Louisa County Board of Supervisors' request that HGSI negotiate with VVL. (PTX 101.)

236. On December 14, 1992, Mr. Gumble telephoned Ms. Ely to begin the negotiations. Ms. Ely told him she was going to be in New York, but to send VVL's offroad proposal for her review. (DTX 115.)

237. On December 15, 1992, Mr. Gumble promptly responded, outlining the major points he believed would be required to reach an agreement. Mr. Gumble proposed that VVL pay HGSI for a permanent easement, or purchase or rent the strip of property that would be involved; that VVL select the route; that HGSI support any other permit applications; and that VVL agree to appropriate reclamation provisions on the parcel. He also indicated that VVL had made preliminary investigations on the construction costs for a road and bridge, and on the delineation of wetlands and routes. (PTX 16.)

238. On December 16, 1992, the Louisa County Board of Supervisors wrote to Dr. Sansom, affirming it would consider his permit application at its meeting scheduled for January 4, 1993. (DTX 14.)

239. On December 21, 1992, Ms. Ely responded to Mr. Gumble's letter of December ***582** 15. Ms. Ely stated that before she could bring the matter to the attention of the HGSI board, she required more details concerning the specific structure and location of the off-road route, to assess the possible impact on HGSI's land. She also indicated that, as the lessee of Brandy A, HGSI had an interest in VVL's mining plans, to determine how those plans might affect Brandy A. (PTX 17; DTX 15.)

240. By quit claim deed of gift dated December 22, 1992, recorded December 23, 1992, Grace conveyed to HGSI its remaining Louisa County properties, with theexception of the A.D. Peers property. (Stip. ¶ 74; PTX 54.)

241. The donation of the A.D. Peers property was withheld pursuant to Grace's and HGSI's understanding to delay the donation, discussed *supra*, because the Board of Supervisors had not yet determined whether to grant VVL a permit to mine Brandy B, or whether such a permit, if granted, would limit the amount of reserves VVL could mine from that property.

242. Grace claimed a substantial income tax deduction for its 1992 donations to HGSI. (Stip. ¶ 78.)

243. All of the properties conveyed in December 1992 contained the same restrictive covenants quoted *supra*. (Stip. ¶ 75; PTX 54.)

244. Grace and HGSI hoped that by making the donated reserves unavailable for mining, VVL would deplete its reserves before it could acquire additional reserves, and thus, go out of business in Virginia.

**25 245. It was not necessary for Grace to include restrictive covenants in order to donate to HGSI or to claim a tax deduction, as Ms. Ely conceded at trial. (Tr. at 1964-65.) The fact that the restrictive covenants were not required for tax purposes is otherwise apparent by Grace's claiming a deduction for its donation of the A.D. Peers property to HGSI in 1994, although the donation deed for that property contained no written restrictive covenants. (Stip. ¶¶ 91, 92.)

246. The restrictive covenants agreed to by Grace and HGSI contained more detailed prohibitions against mining and transporting ore than conservation easements to which HGSI had agreed in the past. (*Compare* Stip ¶ 72 *with* PTX 90, 91; DTX 33.) For example, the covenants prohibited mining even if the land could be successfully restored. (PTX 53.)

247. Ms. Ely conceded that she did not believe Grace was concerned about its standing among environmentalists. (Tr. at 1945.)

248. Some of the properties donated in 1992, such as the Lloyd I and Harris properties, are not located in the Landmark District. (Stip. ¶ 101.) The Lloyd I and Harris properties are known as the "railroad siding," and originally were purchased by Grace to facilitate the loading of vermiculite onto trains, for shipment out of Louisa County. (PTX 438, 471 at G63593.) Like the restrictive covenants on the M.F. Peers River Property, the Lloyd I and Harris properties prohibited the use of the land for the transportation of vermiculite. Grace and HGSI did not agree to include restrictive covenants on those properties in furtherance of any preservationist purpose; rather, the only reason the restrictive covenants were included on the Lloyd I and Harris properties was to prevent VVL from using those properties to transport its vermiculite, in the event that VVL ever found itself in a position to do so.

249. Also on December 22, 1992, by "Assignment and Acceptance Agreement," Grace assigned its Nininger and Brandy A leases to HGSI. (PTX 55, 56; Stip. ¶ 76.)

*583 250. Each of those leases contained the following provision:

> Assignor and Assignee acknowledge that the Agreement creates no obligation upon Assignor to mine the Premises. Assignee, by acceptance of this Assignment, agrees not to mine the Premises and shall exert reasonable efforts to prevent mining on the Premises during the term of the Leasehold Estate created by the Lease Document.

(PTX 55, 56; Stip. ¶ 77.)

251. HGSI paid advance royalty payments to the Niningers pursuant to the Nininger lease. (PTX 56, 131, 441, 442; *cf.* Stip. ¶ 96.)

252. It is not a common practice among preservationist groups to assume payment obligations under mining leases. (Tr at 2126-27.)

253. The Nininger property was transferred only to further HGSI's and Grace's joint goal of preventing VVL from replenishing its depleting reserves; it was not transferred for any preservationist or other potentially legitimate reason.

**26 254. On December 24, 1992, Mr. Gumble responded to Ms. Ely's December 21 letter. He stated that VVL was proposing to construct a road and bridge across the South Anna River, and clarified that the only structure would be a bridge. In response to Ms. Ely's comment about the use of Brandy A, Mr. Gumble said his understanding was that although Grace leased the mineral rights, Brandy, Ltd. continued to control the surface rights, and could use the surface in any manner it wished. Mr. Gumble offered to

meet with Ms. Ely or the HGSI board to discuss VVL's proposal. (PTX 18.)

255. Ms. Ely responded to Mr. Gumble's letter on December 29, 1992. As in her December 21 letter, she informed Mr. Gumble that the HGSI board would not meet with him until he provided more details, ostensibly so that the meeting could be more productive. She added that the Hills had reserved no rights with respect to the Brandy A property, and warned that anyone who entered or used that property without HGSI's consent would be trespassing. (PTX 19; DTX 16.)

256. Ms. Ely knew that VVL would have to cross Brandy A, in addition to the M.F. Peers property, to transport its ore from Brandy B to Purcell. (*E.g.*, PTX 3; Tr. At 218-19.)

257. On January 4, 1993, the Louisa County Board of Supervisors approved VVL's permit to mine Brandy B. The permit did not restrict the amount of reserves that could be mined. (Stip. ¶ 79; DTX 18.)

258. From Ms. Ely's course of conduct during her negotiations with Mr. Gumble, it is apparent that she did not seriously consider providing VVL with an off-road route across the M.F. Peers property. Ms. Ely's requests for "more information" were designed to delay any meeting between Mr. Gumble and the HGSI board pending a decision on VVL's permit to mine Brandy B. Ms. Ely opposes mining in Louisa County, and did not intend to facilitate what she ultimately filed suit to enjoin—mining on Brandy B—by providing VVL with a means of transporting ore from Brandy B to its mill on Purcell.

259. Ms. Patton testified that VVL caused the failed negotiations because VVL did not provide enough information for HGSI to assess adequately VVL's off-road proposal. (*E.g.*, Tr. at 1205-25.)

260. While HGSI may not have had sufficient information to reach a final decision, it did have enough information to begin negotiations with Mr. Gumble. **584 Essentially, those negotiations never began, as Ms. Ely never provided Mr. Gumble with an opportunity to meet with HGSI's board.

261. It would have been futile for VVL to expend the resources necessary to accumulate more details for HGSI, given Ms. Ely's course of conduct during her negotiations with Mr. Gumble.

262. Meanwhile, on February 23, 1993, Mr. Poling prepared a draft memorandum to Mr. Walsh. This memorandum confirms that Grace and HGSI agreed to delay the A.D. Peers donation solely to "limit [VVL's] mining activities":

> Grace did not donate the 266 acre Alfred Peers property to Greensprings [sic] because of an option which Peers holds to purchase back 37 acres designated as Parcel "A" if Grace sold the property. . . . Parcel "A" is thought to contain vermiculite reserves which Peers could lease to Virginia Vermiculite if he exercised the option to purchase this parcel. The availability of Parcel "A" to Virginia Vermiculite was deemed significant only if Virginia Vermiculite's efforts to open a new mine on the adjacent Hill [Brandy] property was [sic] severely restricted by the pending use permit. A conditional use permit has subsequently been granted to Virginia Vermiculite which will not limit their mining activities substantially.

> **27 . . . I recommend that we formally ask Rae Ely to commit on this issue one way or the other, and proceed with the donation of the Peer's [sic] property to Greensprings [sic].
>
> (PTX 340.)

263. In June 1993, HGSI filed a lawsuit against VVL in the state Circuit Court of Louisa County, to enjoin VVL and Brandy, Ltd. from mining Brandy B. *See Historic Green Springs, Inc. v. Brandy Farm, Ltd.*, 32 Va. Cir. 98 (1993) (the "*Brandy*" action), *reprinted at* 1993 Va. Cir. LEXIS 738. (Stip. ¶ 80.)

264. In the *Brandy* action, HGSI contended that Grace's original 1973 Brandy Agreement with the Hills gave the lessee of Brandy A (Grace, and then HGSI) discretion to determine whether mining could occur both on Brandy A and on Brandy B. (Stip. ¶ 81.)

265. VVL and Brandy Farm, Ltd. filed a counterclaim, alleging that Grace's Brandy A donation to HGSI breached Grace's duty to the Hills (Brandy, Ltd.), to exercise its contractual discretion (whether to commence mining) in good faith, by assigning the lease with a non-mining provision to an organization with no mining expertise. (Stip. ¶ 82.)

266. On August 16, 1993, M.F. Peers wrote to Mr. Grace out of "desperation and anger." (PTX 44.) In part, the letter reads:

> You and your company have done a horrible thing. This is a personal appeal to you asking that you act to salvage what is left of a terrible situation before it is too late.
>
> W.R. Grace is killing my brother and has dealt my family a terrible blow. My brother is Alfred (Icky) Peers.

He recently suffered a massive stroke and is in a nursing home. This is the third time my brother has been hospitalized since your employee Greg Poling came here late last year to inform us that W.R. Grace was giving *our land,* about 750 acres, to Historic Green Springs. Icky's first trip to the hospital was the *evening* of the day Mr. Poling informed him of the "gift." Earlier that very day I told Mr. Poling that this news would devastate my brother, and that if anything happened to him it was Grace's fault.

Last year, your company announced it was *giving away our homeplace to a group we have fought for 20 years. . . .*

****585** . . . I want you to help me save my brother's life. *Please let us buy back his property, all of it. . . .* I plead with you to stop any further transfer of any more of our homeplace to Historic Green Springs. Please tell Greg Poling to stop the torture of my brother. . . . It is obvious . . . that all he is interested in is making sure that my brother and his family will never re-gain control of his land. I must assume Mr. Poling is acting on your orders.

Here in Virginia we were raised to speak bluntly. . . . You should know, as we do, a betrayal when you see one.

(PTX 44 (emphasis in original).)

267. On August 31, 1993, Robert J. Bettacchi, President of Grace's Construction Products Division, responded to M.F. Peers's letter. Mr. Bettacchi told M.F. Peers that Grace already had made the decision to donate all

of its holdings in Louisa County to HGSI. Mr. Bettacchi further stated that Grace "recognize[d] that . . . you had expectations at the time your brother's property was sold to Grace in December, 1973 that mining would take place and that there would be some additional economic benefit to your brother," and was "sorry that our mutual expectations for additional economic benefit were not fulfilled." (PTX 45.)

**28 268. On September 2, 1993, Mr. Walsh wrote to Mr. Bolduc, Grace's President and Chairman (Mr. Grace had retired by this time), in reference to A.D. Peers. Mr. Walsh indicated that Grace did not offer to sell all of A.D. Peers's land back to him because "it would have been totally inconsistent with our purposes in making the donation." According to Mr. Walsh, Grace was confident that if it had sold A.D. Peers's land back to him, "he would have, in turn, sold it or leased vermiculite rights to Virginia Vermiculite. Thus, the mining of the Louisa, Virginia area would continue for many more years by our competitor." Mr. Walsh described the prevention of such mining as one of Grace's "goals in 1992" and "purposes in making the donation," based on the relative locations of VVL's properties and the fact that VVL was "running low in terms of vermiculite reserves." (PTX 402.)

269. On September 28, 1993, the court in the *Brandy* action found that the modification of the Brandy Agreement, (*see* ¶ 85 *supra*), "gave Brandy the right to exercise unfettered control over the entire property, in exchange for which Brandy released Grace from the obligation to maintain and secure the property." The court, therefore, denied HGSI's claim. (Stip. ¶ 83.)

270. The *Brandy* court also found in favor of VVL on its counterclaim, finding that by assigning its Brandy lease to HGSI, and by including non-mining provisions in the assignment, Grace breached its duty to exercise its contractual

discretion in good faith. *See* 32 Va. Cir. at 102-03. The court voided the lease, and HGSI appealed. (Stip. ¶¶ 84, 85.)

271. On December 18, 1993, Grace gave notice to the A.D. Peerses that it intended to donate the A.D. Peers properties to HGSI. (Stip. ¶ 87.)

272. The donation was to be made because it was apparent that the delay no longer would adversely affect VVL's ability to mine in Virginia. (PTX 340.)

273. Pursuant to their 1973 Agreement with Grace, the A.D. Peerses chose to exercise their right to buy back Parcel A. (Stip. ¶ 89.)

274. By deed dated January 25, 1994, Grace conveyed Parcel A back to the A.D. Peerses. (PTX 57; Stip. ¶ 89.)

275. Six days later, by deed dated January 31, 1994, Grace conveyed Parcel B to ***586** HGSI. This conveyance was made subject to the terms of the unrecorded December 27, 1973 Agreement between the A.D. Peerses and Grace, pursuant to which Grace agreed to pay per ton vermiculite mining royalties to the A.D. Peerses. (PTX 59; Stip. ¶ 90.)

276. Grace claimed a substantial income tax deduction for its 1994 donation to HGSI. (Stip. ¶ 92.)

277. When Grace donated Parcel B to HGSI, Grace did so in furtherance of its own interest, and with intentional disregard of the financial interest of the A.D. Peerses.

278. The January 31, 1994 deed contained no written restrictive covenants not to mine. (PTX 59; Stip. ¶ 91.)

279. VVL exhausted its Purcell reserves at some point in 1994. (Stip. ¶ 94.)

280. By 1994, Grace viewed itself as supplying 51% of the concentrate consumed in North America, VVL as supplying 30% (17% from Virginia and 13% from South Carolina), and imports, primarily from Palabora, as supplying 19%. (PTX 383 at G16779.)

281. Grace no longer viewed VVL's South Carolina division as "potentially" competitive, as it did in 1986; Grace now characterized both of VVL's divisions as "major North American producers of concentrate." (PTX 179 at G16779.)

282. According to its 1994 business plan, Grace believed that U.S.-based producers of vermiculite had an advantage over most foreign-based producers, due to high shipping costs. However, Grace did not believe U.S.-based companies had an advantage over Palabora. Grace perceived Palabora as being "the only company with any significant success in exporting its vermiculite concentrate because of [its] ability to supply larger (coarse) sizes of the material," notwithstanding its shipping costs. (PTX 383 at G16780.)

283. On February 15, 1994, Ms. Ely wrote to Mr. Favorito, requesting that the restrictive covenants on the Lloyd I and Harris properties, originally conveyed as part of the December 22, 1992 donations, be revised. The letter indicates that Ms. Ely knew these properties originally "were purchased by Grace to facilitate on-loading of vermiculite onto trains which would be carrying it to the exfoliation or marketing sites." The restrictive covenants contained in the donation deed prevented HGSI from using the railroad siding for a commercial or other industrial use. Ms. Ely requested that the deeds be amended "in order that we might sell the property for use as a railroad siding or other commercial / industrial use." (PTX 438.)

284. Knowing that Grace would be concerned that a revision in the deed would permit VVL to use the railroad siding to mine or to transport its ore if VVL ever acquired the property, Ms. Ely said, "If [Grace] . . . wishes to retain any

restrictive provisions, we would suggest that it be limited to the prohibition against mining vermiculite." (PTX 438.)

285. By "Correction Quit Claim Deed of Gift," recorded May 26, 1994, Grace and HGSI revised the restrictive covenants of the Lloyd I and Harris properties.

286. The correction replaced the general prohibition of any type of mining with a restriction that prohibited only the mining and transporting of vermiculite. (Stip. ¶ 102; PTX 58.)

287. HGSI and Grace changed the restriction from mining to vermiculite mining with the specific intent that the change benefit HGSI without benefitting VVL. Because the restrictions continued to prevent the transportation of vermiculite, HGSI would be able to use the properties for commercial purposes, but VVL would not be able to use the properties to transport its vermiculite.

288. On June 20, 1994, the Supreme Court of Virginia refused HGSI's petition for appeal of the *Brandy* decision, (Stip. ¶ 85), finding no reversible error in the judgment of the circuit court. (PTX 67.)

**30 289. As a result of the decision in the *Brandy* action, VVL acquired the right to mine Brandy A, pursuant to the Brandy B mining lease between VVL and Brandy Farm, Ltd. (Stip. ¶ 86.)

290. On August 9, 1994, Ms. Ely wrote a letter to Mr. Favorito of Grace, in which she stated:

> Historic Green Springs, Inc. has recently received the upsetting news that the State Supreme Court has refused to grant its appeal. The effect of this is to open Parcel B AND Parcel A of the Hill [Brandy] tract to vermiculite mining. Added to this is the thirty-seven (37) acre adjoining parcel reconveyed to the Peers, which we

understand has been (or is about to be) leased to Virginia Vermiculite. Altogether, this frees up between seven hundred and fifty (750,000) and one million (1,000,000) tons of vermiculite to VVL. *This appears to be enough reserve to keep VVL in business for the duration of the Nininger lease.*

(PTX 441 (emphasis added).)

291. As Ms. Ely predicted, the A.D. Peerses entered into an agreement with VVL on September 1994, which permitted VVL to mine Parcel A. (Stip. ¶ 95.)

292. On September 29, 1994, HGSI issued a formal notice to the Niningers, terminating its lease of the Nininger property. (PTX 442; Stip. ¶ 96.)

293. HGSI terminated the Nininger lease because the Supreme Court of Virginia's *Brandy* decision frustrated HGSI's only purpose in maintaining the lease: to force VVL out of business in Virginia by preventing it from replenishing its depleting reserves.

294. Since the termination of the Nininger lease, the Nininger property has been, and remains, unleased by any mining company. (Stip. ¶ 99.)

295. The Niningers, however, have attempted to find another mining company to mine and process the vermiculite reserves on their property. (Tr. at 462-69, 789-91.)

296. If VVL obtained rights to mine the Nininger property, it could extend its Virginia mining operations for another fourteen years. (Tr. at 469.)

297. From November 1994 through January 1995, VVL and HGSI met again, purportedly to revive the possibility of off-road haul. (*E.g.*, PTX 80, 81, 82.) The court

accords little weight to the documents prepared during that period, as it is apparent they were prepared in anticipation of the instant lawsuit, which VVL filed against Grace and HGSI on February 21, 1995.

298. In making its donations to HGSI, Grace intended to eliminate its carrying costs, to obtain a substantial tax deduction and favorable publicity, and to injure VVL in its reputation, trade, business, and profession.

299. Grace did not intend to monopolize any appreciable part of interstate commerce, or any appreciable part of the trade or commerce within the Commonwealth of Virginia.

300. Grace did not donate its properties for preservationist reasons. (*E.g.*, PTX 138, 312 at 010438; Tr. at 1945.)

301. In receiving the donations from Grace, HGSI intended to preserve the Landmark District, and to injure VVL in its reputation, trade, business, and profession. HGSI also knew of and knowingly acquiesced in Grace's intentions. 302. In furtherance of their joint intent to injure VVL in its reputation, trade, business, and profession, Grace and HGSI acted willfully, maliciously, and in concert. 303. Credibility of the witnesses in this case is a more difficult issue, but here, guidance is to be found in comparing the evidence *ore tenus* with the documentary evidence. Such a comparison for the witness, Ms. Ely, raises questions as to her credibility. As set out in paragraphs 179-83, 190-92, 206-13, 249-53, 258, and 283-93 *supra*, and paragraphs 11-21 and 107-116 *infra*, Ms. Ely's explanations—or lack of explanations—for a conflict between some of the documents and her testimony surpass the ability and common sense of the court to accept her explanations. Ms. Ely's testimony is therefore discounted because of this conflict.

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304. Ultimately, neither VVL nor competition in any appreciable part of interstate or intrastate commerce was harmed by the donations.

305. Between 1991 and 1994, Grace's annual net income from its vermiculite business declined from $1,479,000 to $671,000. (PTX 383 at G16800.)

306. Between 1991 and 1994, VVL's annual net income from its vermiculite business increased from $529,948 to $857,324. (DTX 55 at 16455, DTX 57 at 16477.)

307. By 1998, VVL's net income had increased to $905,244. (DTX 61 at 17680.) Foreign imports of vermiculite concentrate into the North America had doubled since 1994. (Table 1.)

308. In 1998, of the vermiculite concentrate sold in North America, Grace sold approximately 39%, foreign imports accounted for approximately 31%, and VVL sold approximately 30% (18% in Virginia, 12% in South Carolina). (Table 1.)

309. In 1999, a company called Stansbury Holdings Corporation ("Stansbury") began to take measures to establish vermiculite operations in Dillon, Montana, where it has begun mining. (DTX 100.) Stansbury estimated that its Dillon property contains enough commercially-viable reserves to support the milling of 30,000 tons of ore per year for a period of twenty years. (PTX 116 at 10.) Although Stansbury apparently has yet to establish a profitable operation, (PTX 116 at 5), it acquired substantial assets in mid-2000 to "create the foundation for Stansbury's financial future." (DTX 100.)

310. HGSI currently controls both parcels of the M.F. Peers property and A.D. Peers Parcel B. Those properties contain approximately fifteen years' worth of vermiculite reserves. (Tr. at 283.)

311. VVL currently controls the Purcell property, both Brandy parcels, and the 37-acre A.D. Peers Parcel A.

312. VVL currently is mining only the Brandy parcels and A.D. Peers Parcel A, and VVL's only processing mill is located on the Purcell property. (Tr. at 113-17.)

313. From 1994 through July 2000, VVL incurred costs of $1,063,941 to use trucks to transport its ore out of the Brandy and Parcel A properties, along Route 22, and into the Purcell property. (PTX 83.)

314. If VVL continued to haul its ore in this manner, it would incur transportation costs of $2,701,073, from July 2000 through 2012. (PTX 83.)

**32 315. VVL has plans to move its Purcell mill to the Brandy property. Through August 2000 it had expended $182,000 in plant move costs. (PTX 83.)

**589 316. At its current production rates, VVL controls enough reserves in Virginia to last until the year 2012. VVL has approximately eight years of additional reserves in South Carolina. (Stip. ¶ 17.)

CONCLUSIONS OF LAW

VVL has brought this action contending that Grace and HGSI, by entering into the donation transactions, and by including restrictive covenants not to mine in the deeds of gift and lease assignments, conspired to eliminate VVL from doing business in Virginia. VVL asserts that Grace and HGSI so conspired with the specific intent that VVL be injured in its reputation, trade, business, and profession, and with the specific intent that Grace thereby obtain a monopoly in the production and sale of vermiculite concentrates in North America. Two causes of action remain in the case: (1) conspiracy to monopolize in violation of the Sherman Act and Virginia Antitrust Act, and (2) conspiracy to injure VVL in its reputation, trade, business, and profession, in violation of the Virginia Conspiracy Act.

I. CONSPIRACY TO MONOPOLIZE

1. The Sherman Act makes it unlawful for any person to "combine or conspire to monopolize any part of the trade or commerce among the several States." 15 U.S.C.A. § 2 (West 1997).

2. Section 59.1-9.6 of the Virginia Code prohibits "[e]very conspiracy . . . to monopolize . . . trade or commerce of this Commonwealth." Va. Code Ann. § 59.1-9.6 (Michie 1998).

3. The plaintiff's claim under the Virginia Antitrust Act is governed by the same standard as its claim under the Sherman Act. *See Satellite Television & Associated Res., Inc. v. Continental Cablevision of Va., Inc.*, 714 F.2d 351, 358 n.13 (4th Cir. 1983).

4. The elements of a conspiracy to monopolize claim are: (1) concerted action; (2) a specific intent to achieve an unlawful monopoly; (3) commission of an overt act in furtherance of the conspiracy; and (4) antitrust injury. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 139 (1998); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990).

5. The plaintiff in a civil action bears the burden of proving an antitrust violation, such as a conspiracy to monopolize, by a preponderance of the evidence. *See generally Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (noting that for "federal statutes such as the antitrust or civil rights laws . . . proof by a preponderance of the evidence suffices"); *Ramsey v. United Mine Workers of Am.*, 401 U.S. 302, 308-11 (1971) (holding that the preponderance-of-evidence standard applies in civil antitrust actions against labor unions).

A. CONCERTED ACTION

6. "The Sherman Act contains a 'basic distinction between concerted and independent action.'" *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)).

**33 7. "[L]awful acts may become unlawful when taken in concert." *United States v. United States Gypsum Co.*, 333 U.S. 364, 401 (1948).

8. To establish concerted action for the purposes of a conspiracy to monopolize claim, it is necessary to prove that two or more parties acted with "a unity of purpose or a common design and understanding, or a **590 meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). *See also Monsanto*,

465 U.S. at 768 (holding that "there must be evidence that tends to exclude the possibility of independent action").

9. The court has found that Grace and HGSI shared the goal of injuring VVL in its reputation, trade, business, and profession, (which intent is discussed more fully at ¶¶ 96-117 *infra*), and that they acted in concert to achieve this goal. (*See* Findings of Fact ¶¶ 298, 301-02 *supra*.)

10. The court found that Grace and HGSI acted in concert, and not independently, based on the following facts.

11. In September 1992, Mr. Walsh met with Ms. Ely in Louisa County, to discuss Grace donating its properties to HGSI. It is undisputed that Mr. Walsh and Ms. Ely, at the same meetings, also discussed VVL's pending application to mine Brandy B. (Tr. at 1705.) The court perceives no reason for HGSI and Grace to have discussed VVL in such a context, except to assess how their joint conduct would affect VVL's business.

12. Mr. Walsh's notes of September 1, 1992, and his memorandum of September 17, 1992, confirm that this discussion related to HGSI's "plans and . . . attempts to stop VVL," and to how Grace and HGSI could coordinate their efforts to injure VVL. (PTX 317, 321.)

13. In at least one of Mr. Walsh's conversations with Ms. Ely during this period, they discussed "coordinat[ing]" a "meticulous time line." (PTX 349; Walsh Dep. (Dec. 2, 1997) at 39-41.)

14. Both Grace and HGSI understood that their joint goal of VVL going out of business in Virginia only could be accomplished with HGSI's cooperation, because if the properties were sold or donated to a third-party (such as another landowner, a different conservation group, or the government), the properties ultimately could be resold or leased to VVL. Ms. Ely attempted to convince Mr. Walsh that "[o]nly HGSI [was] motivated to . . . prevent future mining," and admonished that "[a]ny control put in the hands of third parties with unknown agendas will at best dilute and at worst defeat the original objectives." (PTX 326.) Mr. Walsh was of the same understanding. Grace knew that "[HGSI's] war with Virginia Vermiculite . . . ha[d] been going on for years," (PTX 321), and, as Mr. Walsh later told Mr. Kohnken, Grace decided against selling A.D. Peers back his entire property because Grace "[was] confident he would have, in turn, sold it or leased vermiculite rights to Virginia Vermiculite," (PTX 402), which was a contingency that donating to HGSI took into account.

15. Cooperation was evidenced further by: Mr. Walsh's attempt to convince Ms. Ely not to raise the issue of asbestos contamination to harm VVL (as such a subject also would harm Grace); the coordination of the donation announcement with the beginning of Ms. Ely's "war" against VVL; Mr. Walsh's premonition that VVL "may argue that Grace and [HGSI] have cooperated to [VVL's and the Louisa County landowners'] detriment," (PTX 321); Ms. Ely's faxing to Mr. Walsh a list of chemicals purportedly used in VVL's mining operations, (PTX 322, 349); and Ms. Ely's references to Grace's and HGSI's "joint and several goals," "the Grace/HGSI cooperative

undertaking," and "the original objectives." (PTX 326.) The only "joint" goal that Grace and HGSI shared was VVL going out of business in Virginia.

16. Concerted action also is apparent from the face of the deeds and lease assignments **591 containing restrictive covenants and provisions not to mine, including:

> (a) Grace's 1992 donation of the M.F. Peers property with restrictive covenants not to mine, or to transport ore across the property;
>
> (b) Grace's 1992 donation of its remaining properties in Louisa County (except the A.D. Peers property) to HGSI with the same restrictive covenants;
>
> (c) Grace's 1992 assignment of the Brandy A lease to HGSI with provisions not to mine; and
>
> (d) Grace's 1992 assignment of the Nininger lease to HGSI with the same provisions. All of these donations and restrictive covenants and provisions not to mine establish that Grace and HGSI formed a conscious agreement to prevent mining on the donated properties, beyond the simple agreement that the properties be donated.

17. Grace and HGSI jointly agreed to enter into an understanding to withhold the A.D. Peers donation in an attempt to "limit [VVL's] mining activities." (PTX 340.) Grace and HGSI understood that a delay might have prevented VVL from replenishing its depleting reserves if the Louisa County Board of Supervisors had denied VVL's permit to mine Brandy B, or restricted the amount of reserves that could be mined. (PTX 331.)

18. The fact of this understanding, as well as its purpose of injuring VVL, was established, *inter alia*, by the facts that:

> (a) Mr. Poling's memorandum of November 10, 1992, expressed a desire to "enter into an understanding with Green Springs to delay the [A.D. Peers] donation . . . [to] assure [VVL] does not mine Parcel 'A,'" (PTX 331);
>
> (b) the A.D. Peers donation, in fact, was delayed;
>
> (c) the only reason for the delay was "because of an option which Peers holds to purchase back 37 acres . . . . which Peers could lease to Virginia Vermiculite if he exercised the option to purchase the parcel," (PTX 340), thus allowing "the mining of the Louisa, Virginia area . . . for many more years by our competitor," (PTX 342);
>
> (d) "the availability of Parcel 'A' was deemed significant *only if* [VVL's] efforts to open a new mine on the adjacent [Brandy B] property was severely restricted by the pending use permit," (PTX 340 (emphasis added)); and
>
> **35 (e) Mr. Poling recommended proceeding with the donation once the Louisa County Board of Supervisors granted VVL the permit to mine Brandy B without substantial restrictions.

19. Joint action toward a common goal also was established by HGSI's assumption of the Nininger lease without any preservationist purpose, and for the sole

purpose of preventing VVL from replenishing its depleting reserves. Evidence of concerted action in furtherance of such a purpose includes, *inter alia*, Ms. Ely's letter to Mr. Favorito of August 9, 1994, in which Ms. Ely stated that because of the *Brandy* decision, VVL would have "enough reserve to . . . [stay] in business for the duration of the Nininger lease." (PTX 441.) The court perceives no reason why Ms. Fly would write to Grace to make such an observation, unless HGSI and Grace were acting together to prevent VVL from staying in business in Virginia.

20. Ms. Ely's letter to Mr. Favorito, dated February 14, 1994, also establishes that Grace and HGSI acted in concert. Ms. Ely raised the issue of amending the Lloyd I and Harris restrictive covenants to allow for commercial uses. She knew that HGSI and Grace originally had agreed to those restrictive covenants specifically to prevent VVL from using the railroad siding **592 to transport its vermiculite in the event that VVL ever obtained the property, so she suggested to Mr. Favorito that the restrictive covenant "be limited to the prohibition against mining vermiculite." (PTX 438.)

21. The court finds that Grace's and HGSI's actions were not consistent with independent action, and that VVL proved by a preponderance of the evidence that HGSI and Grace acted in concert toward a common goal.

B. SPECIFIC INTENT TO ACHIEVE AN UNLAWFUL MONOPOLY

22. To prove a specific intent to monopolize, VVL must establish that Grace sought to create a monopoly over some appreciable part of interstate commerce. *See American Tobacco Co. v. United States*, 328 U.S. 781, 789 (1946); *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1181-83 (8th Cir. 1982); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 108 F. Supp. 2d 549, 589-91 (W.D. Va. 2000).

23. With respect to HGSI's intent, "it is not necessary that HGSI have shared Grace's alleged anticompetitive motive in entering into a proscribed restraint; it is sufficient that HGSI, regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have anticompetitive effects." *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 156 F.3d 535, 541 (4th Cir. 1998) (citing *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948) ("[A]cquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.") and *Duplan Corp. v. Deering Milliken Inc.*, 594 F.2d 979, 982 (4th Cir. 1979) (*per curiam*) ("Where, as here, the [defendants] were knowing participants in a scheme whose effect was to restrain trade, the fact that their motives were different from or even in conflict with those of the other conspirators is immaterial.")).

**36 24. No economically-defined relevant market has to be proved to establish an intent to monopolize for the purposes of a § 2 conspiracy claim. *See Virginia Vermiculite*, 108 F. Supp. 2d at 589-91.

25. Nor does any "particular level of market power or 'dangerous probability of success' ha[ve] to be . . . proved in a conspiracy claim where the specific intent to monopolize is otherwise apparent from the character of the actions taken." *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980); *see also American Tobacco*, 328 U.S. at 789 (same); *Alexander*, 687 F.2d at 1182 (same).

26. "But where actions are ambiguous, the existence and extent of market power may make the inference of specific intent from conduct more or less plausible." *Hunt-Wesson Foods, Inc.*, 627 F.2d at 926.

27. "Proof that the transactions in question were *primarily* motivated by legitimate business purposes rather than by specific intent to monopolize is a defense to . . . conspiracy to monopolize." *Hospital Bldg. Co. v. Trustees of*

Rex Hosp., 691 F.2d 678, 690 (4th Cir. 1982) (emphasis added). *Cf. Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (holding, in context of an attempt to monopolize claim, that "the necessary intent to monopolize . . . is something more than an intent to compete vigorously").

28. Both sides presented evidence in support of their contentions that Grace and HGSI did or did not have an intent to monopolize when they entered into the donation transactions.

**593. As the trier of fact, the court has considered the conflicting evidence, and, as indicated by the court's finding that Grace and HGSI did not have an intent to monopolize, (*see* Findings of Fact ¶ 299 *supra*), the court resolves this conflict in favor of HGSI.

30. The court finds that Grace and HGSI had mixed motives. Some of these motives were legitimate: Grace wished to eliminate its carrying costs, and to obtain a tax benefit and favorable publicity; HGSI sought to preserve the Landmark District. Another motive, shared by Grace and HGSI, was the specific and malicious intent to injure VVL in its reputation, trade, business, and profession, by preventing it from replenishing its depleting reserves. (*See* ¶¶ 96-117 *infra*.) The court does not consider this latter motive to be a "legitimate business purpose." *Hospital Bldg. Co.*, 691 F.2d at 690.

31. All of these motivations were sufficiently prominent that none can properly be considered a "primary" motivation.

32. Notwithstanding Grace's and HGSI's joint intent to injure VVL in its reputation, trade, business, and profession, the court did not find that Grace had a specific intent to monopolize, or, therefore, that HGSI knew about or acquiesced in such an intent. The court so determined because a party's intent to injure its competitor to increase

its competitive position is not equivalent to—and without more, is not sufficient to establish—an intent to create a monopoly. *See, e.g., NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998) (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) for the proposition that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws"); *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 612 (1977) (holding that "'increasing sales' and 'increasing market share' are normal business goals, not forbidden by § 2 without other evidence of an intent to monopolize," and that the evidence presented did not "bridge the gap between the District Court's findings of intent to increase sales and its legal conclusion of conspiracy to monopolize"); *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 927 (4th Cir. 1990) (finding no intent to monopolize in § 2 attempt case, because "the statements . . . do not show any evidence of illegal intent. . . [but] show only that AMI planned to increase its competitive activity in the Washington area").

**37 33. "[C]ourts should be circumspect in converting ordinary business torts into violations of antitrust laws. To do so would be to create a federal common law of unfair competition which was not the intent of the antitrust laws." *Abcor*, 916 F.2d at 931 (internal quotation marks and citations omitted).

34. VVL established that Grace intended to maximize its competitive position by excluding VVL from doing business in Virginia, and that HGSI knew of and acquiesced in this motive, but not that Grace intended to achieve a monopoly by doing so.

35. Mr. Poling's memorandum of February 14, 1991, (DTX 138), well exemplifies the difference between an intent to monopolize and an intent to injure a competitor's business for the purpose of the state civil conspiracy statute,

(*see infra*), and how Grace harbored the latter, but not the former, intent. On one hand, Mr. Poling stated that the only benefit of donating the properties to HGSI was that VVL would be prevented from acquiring and mining those properties. As discussed in greater **594 detail *infra*, this aspect of Mr. Poling's memorandum is probative evidence that Grace's intent in donating the properties was to injure VVL. On the other hand, Mr. Poling believed that there was no market benefit to the donations, because of foreign competition and ample reserves in South Carolina. This aspect of Mr. Poling's memorandum provides evidence that Grace's intent was not to monopolize the vermiculite industry.

36. The court finds it notable that Grace's and HGSI's internal memoranda, while evidencing a clear intent to limit VVL's access to reserves, appeared never to draw the further inference that such a limitation would lead Grace to obtain monopoly power.

37. Additional evidence that Grace did not intend to monopolize the vermiculite industry in making the donations includes the following.

38. Grace was aware when it made its donations in the early 1990s that VVL's South Carolina operations had expanded dramatically: CVC produced 1% of the vermiculite consumed in North America in 1986, and 13% in 1991, increasing VVL's total market share from 13% in 1986 to 30% in 1991. In 1991, Grace estimated that VVL was "under capacity" in South Carolina, which indicates Grace expected the South Carolina operations to continue to expand. (DTX 135; Poling Dep. (Nov. 20, 1997) at 373-78.)

39. VVL produced no evidence that Grace or HGSI ever took any actions with the intent to harm VVL's South Carolina operations, or to liit VVL's access to reserves in South Carolina. This suggests Grace's actions in Virginia were not intended to create a monopoly in North America,

the segment of commerce VVL alleges Grace intended to monopolize. (*See* Pl.'s Proposed Conclusions of Law at 70 ¶ 235.)

40. Grace perceived itself to be in competition not only with VVL, but with foreign producers of vermiculite, particularly Palabora. (*E.g.*, PTX 76 at G015525 (characterizing Palabora as "the largest and most profitable vermiculite producer [which] dominates the industry with its 'benchmark' product quality and full range of concentrate sizes"); Rogan Dep. (Feb. 10, 1998), at 160 (confirming that Grace's competition in its vermiculite concentrates business were "VVL, . . . the South Africans, and . . . the Chinese"); Poling Dep. (Nov. 19, 1997) at 147 ("[W]e would compete with the sale of vermiculite concentrates from South Africa, from Virginia Vermiculite, from Carolina Vermiculite . . . .").)

**38 41. Grace considered the competition by foreign producers to be expanding: In 1986, Grace estimated that alabora produced 13% of vermiculite consumed in North America, and in 1991, foreign imports produced 23% of all vermiculite concentrate sold in North America.

42. Grace also considered its own market share of North American vermiculite concentrate sales to be declining, from 72% in 1986 to 47% in 1991. (*See also* PTX 76 at G015512 (describing itself as having a "declining share of the vermiculite concentrate market").)

43. Grace's perception that its market share was declining, and that VVL's and Palabora's market shares were expanding, "make the inference of specific intent . . . less plausible." *Hunt-Wesson Foods, Inc.*, 627 F.2d at 926.

44. In 1992, Grace considered the vermiculite industry to be in an "overcapacity situation," and was concerned that "potential new suppliers . . . will only . . . continue the downward price pressure on VCX," Grace's vermiculite concentrate product. (PTX 76 at G015518.)

**595 45. Moreover, on September 17, 1992—in the midst of Grace's concerted action with HGSI—Mr. Walsh wrote to Mr. Kohnken that "the vermiculite business is less important strategically today" and that "we have adequate reserves in South Carolina." (PTX 321.)

46. All of this evidence—including Mr. Poling's memorandum of February 14, 1991—indicates that Grace did not intend to monopolize any appreciable part of interstate commerce by donating its lands to HGSI and by including covenants not to mine in the donation deeds and lease assignments.

47. VVL argues, *inter alia*, that Grace calculated the benefit to itself of VVL closing its Virginia operations; that Grace knew its only competitor in North America in finer grades of vermiculite was VVL; that VVL's exit from the market would eliminate all competition in grades 4 and 5; that Grace knew VVL almost had exhausted its reserves in 1992 and might have had to close in Virginia if it did not secure additional reserves; that Grace entered into the transactions with HGSI with the intent of keeping the reserves from VVL; and that Grace and HGSI purposefully withheld the A.D. Peers donation until they could determine whether VVL could obtain a permit to mine Brandy B. (Pl.'s Proposed Findings of Fact ¶¶ 96-122; Pl.'s Proposed Conclusions of Law ¶ 249.)

48. The court does not find that these arguments, even if accepted, establish an intent to monopolize. Even if all of the propositions advanced by VVL were true, they do not "bridge the gap" between Grace's intent to enhance its competitive position by causing VVL to go out of business

in Virginia, and the conclusion that Grace conspired to monopolize. *United States Steel*, 429 U.S. at 612. The above propositions do not establish that Grace intended that its actions cause VVL to be eliminated altogether from the vermiculite industry, or that Grace believed VVL's exit from Virginia would enable Grace to secure a monopoly. VVL's necessary, but unproved, assumption is that Grace intended to exclude VVL from Virginia in order to create a monopoly.

**39 49. For example, VVL established that Grace calculated its benefit from increased business if VVL stopped mining in Virginia to be $1.5 million over twenty years. While this evidence tends to prove that Grace donated the properties to enhance its competitive position and to injure VVL's business, it does not show that the donations were made to create an unlawful monopoly. VVL characterizes Grace's calculation as a calculation of "anticompetitive" benefit. However, to infer from Grace's calculation that the benefit was intended to be anticompetitive, *i.e.* to "bridge the gap" and conclude that Grace intended to monopolize, would require proof of the additional fact that Grace believed this increased $1.5 million in business would lead to the obtention of a monopoly. This additional fact was not established by a preponderance of the evidence.

50. VVL maintains that Grace expected to obtain this $1.5 million "anticompetitive" benefit by raising the price of its finer grades of vermiculite, which VVL claims only it and Grace produce. There are several problems with this argument. First, VVL did not prove by a preponderance of the evidence that Grace believed it could obtain a monopoly in the North American production and sale of *all* vermiculite concentrates simply by raising prices in the finer grades. Second, VVL did not establish that Grace intended to raise the prices of those grades above a competitive price, or that Grace believed it could do so notwithstanding VVL's continued production in South Carolina. Third, at the time

of the donations, Grace believed Palabora had a "full range of concentrate sizes," (PTX 76 at G015525), and a "full product line" characterized by "excellent yields" and "high purity." (PTX 76 at G015524.) Fourth, VVL's argument reduces to a quasi-economic claim that Grace intended to monopolize the interstate commerce of particular grades of vermiculite. This argument is unavailing, not only because the court already has rejected VVL's assertion that separate markets exist for each grade of vermiculite concentrate, *see Virginia Vermiculite*, 108 F. Supp. 2d at 584-86, but because VVL did not establish that Grace believed the interstate commerce of any particular grade of vermiculite could be monopolized.

51. The parties presented evidence on such matters as whether there are, in fact, economic substitutes for vermiculite, whether foreign imports in fact affect the price of vermiculite in the United States, and how various VVL customers and international vermiculite producers perceived the impact of foreign sales on the domestic vermiculite market. The court found this evidence to have very little, if any, probative value on the question of how Grace and HGSI perceived the industry, that perception being relevant to their alleged intent that Grace monopolize an appreciable part of interstate commerce. To the extent that VVL offered evidence of third parties' perceptions of the industry to establish an inference that Grace perceived the industry as the third parties perceived it, that inference was not drawn.

**40 52. While the court cannot say definitively that Grace *did not* intend to monopolize an appreciable part of interstate commerce, the court concludes that VVL has not satisfied its burden of proving by a preponderance of the evidence that Grace *did* intend to monopolize an appreciable part of interstate commerce.

53. Taken as a whole, VVL's evidence of intent to monopolize, while sufficient to show that Grace and HGSI intended to drive VVL out of business in Virginia, (*see infra*), was not sufficient to show that, by driving VVL out of business in Virginia, Grace and HGSI intended that Grace achieve an unlawful monopoly over an appreciable part of interstate commerce, as required by the Sherman Act § 2.

54. The court concludes by addressing intent to monopolize for the purposes of the Virginia Antitrust Act. No evidence was presented that Grace intended to monopolize the vermiculite trade within Virginia; Grace never mined in Virginia, and abandoned all of its vermiculite reserves in Virginia. For these reasons, the court found Grace did not intend to monopolize the trade or commerce of vermiculite within the Commonwealth of Virginia. (*See* Findings of Fact ¶ 299 *supra.*)

55. Although VVL failed to prove a specific intent to monopolize, the court shall address briefly the element of antitrust injury, which VVL also has failed to prove.

C. ANTITRUST INJURY

56. The Clayton Act provides a private party—as opposed to the United States Department of Justice or the Federal Trade Commission—with standing to sue for violations of the Sherman Act.

57. Section 4 of the Clayton Act ("§ 4"), 15 U.S.C. § 15(a), authorizes private actions for treble damages. Section 16 ("§ 16"), 15 U.S.C. § 26, authorizes private actions for injunctive relief.

58. The Supreme Court has established several requirements to determine whether an antitrust plaintiff has standing to seek antitrust remedies under the Clayton Act. *See Cargill v. Monfort of Colo., Inc.*, 479 U.S. 104, 109-10 & n.5 (1986); *Brunswick Corp. v. Pueblo Bowl-O-*

Mat, Inc., 429 U.S. 477, 489 (1977); *see also Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 219-20 (4th Cir. 1987).

59. The first requirement is that the plaintiff have suffered "antitrust injury"; if this is satisfied, then other factors, such as direct causation in fact between the plaintiff's injury and the defendant's alleged antitrust violations, also must be considered to determine whether the plaintiff may sustain a claim under the Clayton Act. *See Cargill*, 479 U.S. at 110 n.5; *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540 (1983).

60. "[A]ntitrust injury . . . is . . . injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" *Brunswick*, 429 U.S. at 489 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)).

**41 61. The plaintiff must establish "harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself." *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998). *See also id.* at 139 (applying this principle to § 2 conspiracy claim).

62. To prove harm to the competitive process, the plaintiff must prove that "the damages sought . . . flow from that conduct which is proscribed by the antitrust laws." *Thompson Everett, Inc. v. National Cable Adver., L.P.*, 57 F.3d 1317, 1325 (4th Cir. 1995) (citation omitted) (emphasis omitted). *See also Sullivan v. National Football League*, 34 F.3d 1091, 1097 (1st Cir. 1994) ("[A]n action harms the competitive process 'when it obstructs the achievement of competition's basic goals—lower prices, better

products, and more efficient production methods.'" (quoting *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990))).

63. Following this court's summary judgment opinion, VVL has only one remaining claim for damages: past and future transportation damages, from 1994 to 2012. (*See* PTX 83.) VVL alleges it could not conduct off-road hauling of its ore and tailings mined at the Brandy and A.D. Peers Parcel A properties to the processing plant at Purcell, due to HGSI's M.F. Peers property being situated directly between Purcell and the others. VVL bases its past transportation damages on actual costs of on-road hauling of raw ore to its Purcell mill, and bases its future transportation damages on the projected costs of hauling raw ore to the mill, and pumping tailings back to the mine site for restoration, up to the time that it anticipates it will deplete its Virginia reserves.

64. To establish antitrust injury flowing from Grace's and HGSI's concerted actions, VVL first advances several arguments that competition would be harmed if VVL stopped mining in Virginia. VVL maintains that, if it depleted its reserves in Virginia, the only competition Grace would face would be from foreign producers who must pass along higher transportation costs; that consumers could not rely on obtaining a steady source of vermiculite at a competitive price prior to VVL's entry in the market; that VVL's entry into the marketplace made vermiculite concentrate prices competitive; and **598 that market conditions "may" return to an uncompetitive state should VVL no longer be able to produce vermiculite from Virginia reserves. (*E.g.*, Pl.'s Proposed Findings of Fact ¶¶ 152, 159, 165, 167.)

65. These propositions, even if true, are irrelevant. At issue is not whether competition *would be* or *may be* harmed, but whether competition *was* or *will be* harmed, by Grace's and HGSI's concerted actions. Is it undisputed that Grace and HGSI, in fact, *did not* drive VVL out of the market. VVL

currently has enough reserves to keep mining in Virginia until 2012 and enough reserves in South Carolina to last another eight years; VVL operates profitably in South Carolina notwithstanding transportation distances twenty times greater than those in Virginia (where VVL only transports its ore over a one-half mile stretch of Route 22); VVL's net income increased during and after the period that the donations were made; and VVL's market share has remained stable since that period. VVL concedes that "HGSI has not . . . been able to prevent VVL from mining." (Pl.'s Proposed Findings of Fact ¶ 17.) Consequently, what might happen if VVL ultimately exits the market in the future in no way tends to prove that competition actually *was* harmed by Grace's and HGSI's concerted action.[2]

**42 66. VVL argues that if it proved that Grace's and HGSI's concerted actions caused it to suffer transportation damages, any such damages necessarily would harm competition because VVL is Grace's only other domestic competitor. VVL further contends that because those transportation damages in fact led it to raise the price of its vermiculite, harm to competition flowing from Grace's and HGSI's concerted action was shown.

67. VVL's arguments are premised on the mistaken assumption that Grace's and HGSI's concerted actions caused it to suffer transportation damages.

68. Since the beginning of the instant action, causation has been the principal gap in VVL's allegations. At the summary judgment stage of these proceedings, VVL failed to produce sufficient evidence that Grace had a duty to deal with VVL under the antitrust laws, *see Virginia Vermiculite*, 108 F. Supp. 2d at 600-01, and the question of how VVL was injured by the transfer of properties in which it had no legal interest, was not answered at trial.

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2 The question of whether competition *will be* harmed by Grace's and HGSI's concerted action is addressed infra at paragraphs 83-87 *infra*.

69. The crux of an antitrust action is individual injury in fact. *See Windham v American Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977); *see also Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 129 (4th Cir. 1995) (noting that injury in fact is required to prove damages, and also is relevant to determine standing).

70. To prove injury in fact, VVL must establish "*some* damage flowing from the unlawful conspiracy . . . . It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (emphasis in original).

71. In this case, "the relevant question for causal purposes is . . . whether Grace *would have* allowed mining in the absence of both the donation and the nonmining agreements." *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 156 F.3d 535, ***599** 539 (4th Cir. 1998) (emphasis added; original emphasis omitted).

72. "[E]ven if Grace lawfully *could have* donated the lands to HGSI without the nonmining agreements, it is foreclosed from challenging causation simply on the basis that it *could have* achieved the same result through lawful means." *Id.* (emphasis added).

73. Having considered the evidence and testimony presented at trial, the court concludes that VVL failed to prove by a preponderance of the evidence that Grace *would have* sold or leased its properties to VVL, or that Grace otherwise would have allowed VVL to mine those properties in the absence of both the donations and covenants not to mine.

74. But for the donations to HGSI, Grace would have been in the position it was in before it decided to make the donations, *i.e.* faced with a variety of options for the disposition of its properties.

75. Although the option of selling to VVL remained a possible option for Grace through July 1992, this option appeared to be less viable than Grace's other options, given the failure of Grace's previous negotiations with VVL. Despite Dr. Sansom's attempt at trial to explain why his counter-offer of $1.75 million at the third meeting technically was not lower than his original offer of $1.75 million, the fact remains that Grace perceived Dr. Sansom's offer as being inadequate, and as indicating VVL's inability or unwillingness to deal with Grace. (DTX 7, 137.) Moreover, Grace was aware of the obvious business disadvantages of selling its reserves to its principal competitor, and had other interests besides obtaining immediate income, such as maintaining a defensive posture on its reserve base. (*E.g.*, DTX 135, 138; PTX 14, 312.) None of those interests could have been accomplished by Grace selling its reserves to VVL.

76. Therefore, but for the donations, Grace likely would have pursued one of its other options, such as selling the properties for a non-mining use (thus maintaining the mineral rights) to a third party or to the government, or retaining the properties without mining them, as it had for twenty years.

77. It thus was not proven that Grace would have sold to VVL under any circumstances, let alone "but for" the concerted action.

78. VVL also argues that the donation of the M.F. Peers property with the restrictive covenant not to mine caused VVL to incur transportation damages because the restrictive covenant prohibited the cross-river transportation

of vermiculite over the M.F. Peers property. As a direct result, VVL contends, it could not transport ore across the same and had to use the road and incur transportation costs.

79. The court agrees that the restrictive covenant not to mine prohibited HGSI from allowing cross-river transportation of vermiculite over the M.F. Peers River Property. However, the court does not conclude that the prohibition was a material cause of VVL not being able to transport ore across the same. Neither Grace nor HGSI would have allowed such access even if there were no restrictive covenants on the M.F. Peers property. Grace had no interest in assisting one of its principal competitors, and Ms. Ely's course of conduct during her negotiations with Mr. Gumble indicated that she never seriously considered providing such access to VVL. HGSI's "war" with VVL and with Dr. Sansom "ha[d] been going on for years." (PTX 321.) Like Grace, HGSI intended to injure VVL, not assist it.

80. Moreover, transportation costs typically are a part of doing business as a vermiculite mining company. (*E.g.*, Tr. at ***600** 969; PTX 383 at G16786.) In South Carolina, VVL must transport its ore over a distance twenty times greater than in Virginia. VVL would have incurred its transportation costs even if the concerted action never had occurred.

81. The court concludes that VVL did not prove by a preponderance of the evidence that Grace's and HGSI's concerted action materially caused or will cause VVL to suffer transportation damages.

82. VVL accordingly did not prove that Grace's and HGSI's concerted action actually caused it any injury, or had any adverse effect on competition.

83. Section 16 of the Clayton Act differs from § 4 in that the latter requires a showing of actual injury while the former only requires a showing of threatened injury. Section 4 requires proof of injury to "business or property," while § 16 does not.

84. The Supreme Court has held that "[i]t would be anomalous . . . to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 112 (1986). Therefore, the Supreme Court held that a plaintiff seeking injunctive relief under Clayton Act § 16 must show "a threat of antitrust injury." *Id.* at 122.

***44** 85. Because VVL has reserves in Virginia sufficient to keep it in business through the year 2012, VVL argues that Grace's and HGSI's concerted actions threaten antitrust injury because the actions set in motion events that will cause VVL to go out of the market in the future, *i.e.* in the year 2012.

86. The court rejects this argument. To conclude that Grace's and HGSI's concerted actions set in motion events that will cause VVL to go out of the market would require an excessive degree of speculation. Grace's and HGSI's actions had no effect on VVL's ability to operate in Virginia or South Carolina, and even if VVL ultimately depletes its current reserves, it could stay in business for decades if it acquired some or all of the millions of reserves available in South Carolina and in the Nininger property. Therefore, even if VVL ultimately goes out of business, it cannot be said with sufficient certainty that it will have done so as a result of Grace's and HGSI's actions.

87. VVL maintains that although the Niningers are seeking to lease their reserves for mining, VVL will be unable to mine the property because HGSI will oppose any permits for such use. The court rejects this argument

because the inferences necessary to reach the conclusion that VVL will not be able to mine the Nininger property are "so tenuous and speculative that they may not be reasonably drawn from the circumstantial evidence." *Ford Motor Co. v. McDavid*, 259 F.2d 261, 266 (4th Cir. 1958). To reach the conclusion VVL seeks to draw, the court would have to assume, at minimum, that VVL would not be able to obtain such a permit if HGSI opposed it. This assumption not only would be speculative, but historically unfounded, as VVL obtained mining permits in the past notwithstanding HGSI's opposition.

88. In summary, the court concludes that VVL has not proven that Grace and HGSI entered into the transactions with the specific intent that Grace obtain an unlawful monopoly, or that Grace's and HGSI's concerted action actually caused, has threatened to cause, or will cause, any antitrust injury. Accordingly, VVL has not established by a preponderance of the evidence that HGSI is liable for conspiracy to monopolize in violation of the Sherman *601 Act § 2, and the Virginia Antitrust Act § 59.1-9.6.

II. VIRGINIA CONSPIRACY ACT

89. The Virginia Conspiracy Act subjects to criminal liability any two persons who "combine, associate, agree, mutually undertake or concert together for the purpose of . . . willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever." Va. Code Ann. § 18.2-499 (Michie 1996). Any person injured by reason of a violation of § 18.2-499 may file a civil action and recover treble damages pursuant to § 18.2-500(a), and injunctive relief pursuant to § 18.2-500(b).

90. The elements of a statutory conspiracy claim under the Virginia Conspiracy Act are: (1) concerted action (2) legal malice; and (3) causally-related injury. *See Multi-*

Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 108 F.3d 522, 526 (4th Cir. 1997); *Simmons v. Miller*, 544 S.E.2d 666, 676-77 (Va. 2001); *Allen Realty Corp. v. Holbert*, 318 S.E.2d 592, 596 (Va. 1984).

**45 91. The plaintiff bears the burden of proving a violation of the Virginia Conspiracy Act by clear and convincing evidence. *See Simmons*, 544 S.E.2d at 676-77; *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522, 526 (4th Cir. 1997).

A. CONCERTED ACTION

92. The plaintiff's first burden is to show that HGSI and Grace "combined, associated, agreed, mutually undertook, or concerted together." *Simmons*, 544 S.E.2d at 677.

93. The evidence of concerted action summarized *supra* with respect to the counts for conspiracy to monopolize established clearly and convincingly that Grace and HGSI acted in concert, and not independently.

B. LEGAL MALICE

94. The element of legal malice requires the plaintiff to prove that the concerted action was undertaken to injure the plaintiff "intentionally, purposefully, and without lawful justification." *Simmons*, 544 S.E.2d at 677; *Tazewell Oil Co. v. United Va. Bank*, 413 S.E.2d 611, 619 (1992).

95. The Virginia Conspiracy Act "does not require that the *co-conspirator* act with legal malice. Rather, the statute simply requires that one party, acting with legal malice, conspire with another party to injure the plaintiff." *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522, 527 (4th Cir. 1997) (emphasis added).

1. PURPOSE OF INJURING REPUTATION, TRADE, BUSINESS, OR PROFESSION

96. The evidence presented at trial established clearly and convincingly that Grace and HGSI undertook their concerted action intentionally and purposefully to injure VVL's business. Grace and HGSI intended that their actions cause VVL to go out of business in Virginia by preventing VVL from replenishing its diminishing reserves.

97. Although Grace and HGSI also harbored collateral, independent motives—Grace intended to receive a tax deduction and favorable public relations, and HGSI intended to preserve the Landmark—their shared purpose of injuring VVL in its business is sufficient to establish the requisite intent under the Virginia Conspiracy Act. *See Simmons*, 544 S.E.2d at 677 ("Code §§ 18.2-499 and -500 do not require a plaintiff to prove that a conspirator's primary ***602** and overriding purpose is to injure another in his trade or business.").

98. The court's finding that Grace and HGSI shared the joint intent of injuring VVL in its reputation, trade, business, and profession, is based on the following facts.

99. In the 1970s, Grace, VVL, and HGSI all converged upon Louisa County. For the two decades leading up to the donations, each mutually opposed the others' practices and interests in the District.

100. During that period, HGSI opposed mining by Grace and by VVL. Ms. Ely intensely researched the vermiculite industry, frequently appeared in opposition to Grace at meetings of the Louisa County Board of Supervisors, studied the area, advised local residents about mining and preservation, and organized grass-roots efforts to oppose mining and development. (*E.g.*, Stip. ¶ 58; (Ely dep. (Apr. 14, 1999) at 430); PTX 457, 458, 460; Tr. at 1689-

91, 1869-84.) Ms. Ely advised Mr. Gumble that if VVL attempted to mine south of Route 22, the "Maginot line," VVL could expect "World War III." (Tr. at 282.)

**46 101. Ms. Ely's intent is imputable to HGSI, not only because she served as its President, but because she effectively gained exclusive control over HGSI's operations in the early 1990s. (*E.g.*, PTX 94, 94, 107, 121.)

102. During those same two decades, Grace had a "strategy" of holding its reserves solely to keep those reserves from its competitor, VVL. (PTX 312, 321; DTX 138.)

103. When Grace decided to reevaluate the viability of this strategy in the early 1990s, HGSI and Grace realized that their joint antipathy of VVL could work to their mutual benefit.

104. Prior to the donations, both Grace and HGSI knew that VVL was depleting its reserves in Louisa County, and that VVL was seeking to acquire more reserves, specifically on Brandy B. (*E.g.*, PTX 68, 76, 78, 120, 303, 312, 321; DTX 138; Tr. At 1705.)

105. Grace perceived that the manner in which it disposed of its properties could influence VVL's "ability to continue to operate," (DTX 133 at G003189; 76 at G015522; PTX 312 at 010439), such that VVL could be "forced to cease operations" in Louisa County if VVL was unsuccessful in obtaining additional reserves. (DTX 138 at G003119.)

106. Grace calculated how much its vermiculite business would benefit from VVL closing in Virginia due to a lack of reserves, and how much VVL's vermiculite business would benefit if VVL obtained Grace's Virginia reserves. (PTX 303, 313.)

107. The September 1992 meetings between Grace and HGSI marked the beginning of their agreement that their joint interests would be served by VVL running out of

reserves in Virginia. It is undisputed that at the meetings of September 1 and 2, 1992, at which Grace and HGSI discussed the feasibility of a donation, Ms. Ely and Mr. Walsh also discussed the fact that VVL was applying for a permit to mine Brandy B. (Tr. At 1705.) This indicates HGSI and Grace discussed how a donation would impact VVL, given VVL's shortage of reserves. Mr. Walsh's notes of September 1 confirm that he and Ms. Ely discussed the "Virginia Vermiculite plans" and "[HGSI's] attempts to stop Virginia." (PTX 317.)

108. Mr. Walsh's memorandum of September 17, 1992, also confirms that the discussion included Grace's strategy of keeping reserves from VVL; that Ms. Ely was interested in assuming Grace's lease obligations to "keep[ ] the reserves off the market"; and that in discussing VVL's pending permit application, Ms. Ely expressed **603 to Mr. Walsh that she was interested in "taking on" VVL in the "war of all holy wars," and in reporting purported environmental problems with VVL's operations. (PTX 321.)

109. Ms. Ely faxed Mr. Walsh a list of chemicals supposedly used in VVL's mining operations. (PTX 322, 349.) Ms. Patton of HGSI could think of no legitimate reason for Ms. Ely to have done so. The only plausible explanation is that Ms. Ely was discussing such matters with Mr. Walsh in furtherance of HGSI's and Grace's concerted effort to injure VVL, and, in this instance, to identify possible ways in which VVL might have violated environmental laws.

**47 110. Ms. Ely assured Grace that its interests would be served best by cooperating with HGSI, because "only HGSI [was] motivated to . . . prevent future mining." (PTX 326.)

111. In Ms. Ely's September 28, 1992, letter, she observed that Grace and HGSI had "joint and several goals." (PTX 326.) The only "joint" goal that Grace and HGSI shared was VVL going out of business in Virginia.

112. The timing of the donations was important to both Grace and HGSI, because both knew that VVL was running out of reserves, and hoped that the donations would prevent VVL from acquiring the reserves it needed to stay in business in Virginia. This joint intent was established, *inter alia*, by:

(a) Mr. Kohnken's September 1992 memorandum, in which he recognizes—twelve days before the donations were announced—that VVL was about to apply for new mining permits, and in which he states that "[b]ecause of the new development at Virginia Vermiculite, I propose we proceed and make our announcement next week . . . ." (PTX 320);

***604** (b) Ms. Ely's letter to Grace on November 18, 1992, in which she cited "everyone's interest" in Grace making a well-timed conveyance of the M.F. Peers River Property, "since doing so will produce the maximum benefit," (PTX 431);

***48** (c) Mr. Walsh's memorandum to Mr. Bolduc, which states that Grace's "goals in 1992" and "purposes in making the donation" included preventing "the mining of the Louisa, Virginia area . . . by our competitor," based on the relative locations of VVL's properties and the fact that VVL was "running low in terms of vermiculite reserves," (PTX 402);

(d) Mr. Walsh's notes of a conversation he had with Ms. Ely, in which they discussed "coordinat[ing]" a "meticulous time line," (PTX 349; Walsh Dep. (Dec. 2, 1997) at 39-41);

(e) HGSI's and Grace's ultimate agreement to delay the donation of the A.D. Peers property for the sole reason that an earlier donation of that property might have provided VVL with an opportunity to replenish its depleting reserves, (*see* PTX 331, 340, 342, 402); and by

(f) HGSI's ultimate assumption of the Nininger lease for the sole purpose of preventing VVL from replenishing its depleting reserves, and its abandonment of that lease once it became clear that VVL would not run out of reserves. *(See infra.)*

113. Grace and HGSI agreed to include the restrictive covenants with the donations to prevent VVL from mining the donated properties or using them to transport its ore. This intent was established by the following evidence:

(a) Mr. Hackett's notes of September 9, 1992, indicate Grace was considering a charitable donation, "as long as there is some protective clause against allowing any Grace competitor, at any future time, to conduct mining operations," (PTX 450);

(b) None of Grace's objectives in making the donations was to further preservationist interests, (PTX 312), but Mr. Walsh wished to include non-mining restrictions with any donation, (PTX 350 at G013749), which indicates that Grace only wished to include non-mining restrictions to prevent VVL from mining;

(c) Ms. Ely conceded on cross-examination that she did not believe Grace was interested in preservation, (Tr. at 1945), and that she knew it was not necessary for Grace to include restrictive covenants in order to donate to HGSI or to claim a tax deduction, (Tr. at 1964-65; *cf.* Stip. ¶ 92);

(d) The restrictive covenants agreed to by Grace and HGSI contain much more detailed prohibitions against any type of mining or transportation of ore than conservation easements to which HGSI agreed in connection with other properties, (PTX 90, 91; DTX 33);

(e) Grace and HGSI intended to prevent VVL from using the M.F. Peers River Property to transport the vermiculite VVL eventually would mine at Brandy B to its mill at the Purcell property, which intent is clear from the fact that Mr. Gumble had informed Mr. Poling shortly prior to the M.F. Peers donation that VVL wanted to use the River Property for that exact purpose, (PTX 14; Tr. at 356-59);

(f) Because two of the properties donated in 1992, the Lloyd I and Harris properties, are located at a railroad siding outside of the Landmark District, (PTX 438), it is not plausible that Grace and HGSI agreed to include restrictive covenants on those properties in furtherance of a preservationist purpose;

(g) Neither HGSI nor Grace believed that the Lloyd I and Harris properties contained any vermiculite, and both realized

that their only value to a vermiculite company would be for transportation purposes, (PTX 438), which indicates that HGSI and Grace agreed to restrictive covenants on those properties solely for the purpose of preventing VVL from using the railroad siding for transportation purposes;

(h) Ms. Ely's letter of February 15, 1994, describing her desire to use the Lloyd I and Harris properties "for use as a railroad siding or other commercial . . . [or] industrial use," (PTX 438), her suggestion that "[i]f [Grace] . . . wishes to retain any restrictive provisions . . . it be limited to the prohibition against mining vermiculite," (PTX 438), and the correction quit claim deed itself, all confirm that Ms. Ely was not concerned about the industrial uses of those properties, and that HGSI's and Grace's original intent in including the restrictive covenants on the Lloyd I and Harris properties was not to further preservationist interests, but simply to injure VVL in its business.

114. From the facts that the original draft of the A.D. Peers deed contained the same restrictive covenants as the properties transferred in 1992, (Stip. ¶ 93), and that Grace and HGSI cooperated closely to prevent VVL from mining the donated properties, including delaying the donation of the A.D. Peers property, it appears that Grace and HGSI had an understanding that HGSI would prevent mining on the A.D. Peers property to the same degree as it would with the other donated properties.

115. It likewise appears that the only reason the restrictive covenants were removed from the A.D. Peers donation deed was because Grace and HGSI knew from the

Brandy decision that including such covenants likely violated Grace's duty of good faith and fair dealing towards the property owner, and Grace and HGSI wished to avoid the rescission of the A.D. Peers donation.

*605 **49 116. The Nininger property was transferred only to further HGSI's and Grace's joint goal to prevent VVL from replenishing its depleting reserves; it was not transferred for any preservationist or other legitimate reason. This intent was established by:

(a) The fact that it was not a common practice among preservationist groups to assume payment obligations under mining leases, (Tr at 2126-27);

(b) Mr. Walsh's September 1992 memorandum to Mr. Kohnken, which indicates that HGSI agreed to assume the obligations under Grace's mineral lease agreements, including future annual payments, to "keep[ ] the reserves off the market," (PTX 321 at G013718);

(c) Ms. Ely's August 9, 1994 letter to Grace regarding the Nininger property, in which she expressed her dismay that the denial of the *Brandy* appeal appeared to provide VVL access to "enough reserve to keep VVL in business for the duration of the Nininger lease." (PTX 441.) This letter *alone* establishes that HGSI and Grace were acting in concert, that their goal in making, at minimum, the Nininger donation, was to "keep VVL [out of] business," and that HGSI not only was aware of this goal, but itself had the specific intent that the donation harm VVL's business; and

(d) The fact that HGSI stopped paying the Nininger lease—thus returning the leasehold to the Niningers' control, exposing it to be mined—only once it became clear that keeping the property away from VVL would not cause VVL to run out of reserves, which indicates that the only reason HGSI accepted the Nininger donation in the first instance was to attempt to force VVL to run out of reserves in Virginia.

117. The evidence recited above establishes clearly and convincingly that HGSI and Grace combined, associated, agreed, mutually undertook or concerted together for the purpose of willfully and maliciously injuring VVL in its reputation, trade, business, and profession.

2. WITHOUT LAWFUL JUSTIFICATION

118. "Without lawful justification" means that the defendants contrived "to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1284 (4th Cir. 1987) (quoting *Hechler Chevrolet, Inc. v. General Motors Corp.*, 337 S.E.2d 744, 748 (Va. 1985)); *cf. Feddeman & Co., C.P.A., P.C. v. Langan Assocs., P.C.*, 530 S.E.2d 668, 675 (Va. 2000) (holding that "the failure of legal justification may include a breach of . . . fiduciary duty or assisting someone to breach their fiduciary duty" (internal quotation marks omitted)).

119. The Virginia Conspiracy Act thus requires that the plaintiff prove that at least one of the co-conspirators acted *either* with an unlawful purpose, *or* by unlawful means. *Cf. Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522, 527

(4th Cir. 1997) (holding that the Virginia Conspiracy Act "does not require that the co-conspirator act with legal malice").

**50 120. In the present case, Grace donated its properties to HGSI by unlawful means, namely, by breaching its contractual duty of good faith and fair dealing toward the M.F. and A.D. Peerses.[3]

**606 121. Citing the court's summary judgment opinion, HGSI maintains that the law of the case bars VVL from arguing any unlawful purpose or means except conspiring to monopolize. This is not so. The court previously held that VVL's evidence concerning a conspiracy to monopolize was sufficient to withstand a motion for summary judgment on the Virginia Conspiracy Act claim. *See Virginia Vermiculite*, 108 F. Supp. 2d at 606. The court did not thereby hold that the Virginia Conspiracy Act claim *only* could be supported by the evidence of a conspiracy to monopolize; the court simply did not expound needlessly upon the other evidence that supported that claim, such as evidence that Grace breached its contractual duty of good faith and fair dealing.

122. Furthermore, although VVL's and the Peerses' causes of action against Grace for breach of the duty good faith and fair dealing were dismissed when VVL and the Peerses settled with Grace, the fact of the breach by Grace, one of the alleged coconspirators, still can serve as a predicate for a finding of unlawful means under the Virginia Conspiracy Act. *See Multi-Channel*, 108 F.3d at 527.

123. Virginia contract law recognizes a cause of action for failure to exercise contractual discretion in good faith. *See Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*,

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3 The court accordingly need not decide whether the specific intent to drive VVL out of business in Virginia alone is a sufficiently "unlawful" purpose under the Virginia Conspiracy Act.

156 F.3d 535, 542 (4th Cir. 1998) (holding that "it is a basic principle of contract law in Virginia . . . that although the duty of good faith does not prevent a party from exercising its explicit contractual *rights*, a party may not exercise contractual *discretion* in bad faith, even when such discretion is vested solely in that party" (emphasis in original)); *Historic Green Springs, Inc. v. Brandy Farm, Ltd.*, 32 Va. Cir. 98, 102-03 (1993) (holding that Grace breached its good faith duty to the owner of the Brandy properties by transferring Brandy A to HGSI).

124. "[T]o . . . establish[ ] 'bad faith' on the part of contracting parties who are merely under the obligation to exercise good faith in the conduct of a business relationship. . . . [the plaintiff] is required to show that the [defendant] acted in furtherance of its own interest, with intentional disregard of the financial interest of the [plaintiff]." *State Farm Mut. Auto. Ins. Co. v. Floyd*, 366 S.E.2d 93, 97 (Va. 1988); *see also Virginia Vermiculite*, 108 F. Supp. 2d at 608 (collecting cases).

125. By its original agreements with the A.D. Peerses and M.F. Peerses, Grace had discretion whether to mine the Peerses' properties under the contracts that provided for mining royalties if mining took place. VVL contends that Grace's donation of the A.D. Peers and M.F. Peers properties to an organization that has conducted a twenty-year campaign against the mining of vermiculite in Louisa County breached Grace's duty to exercise its contractual discretion in good faith.

****51** 126. The court agrees, based on the additional fact that, in so donating its properties, Grace acted in furtherance of its own interest and with intentional disregard of the financial interest of the Peerses.

127. Grace claimed substantial tax deductions for the donations of the Peerses' properties, (Stip. ¶¶ 78, 92), which demonstrates it acted in furtherance of its own financial interest.

128. Grace was aware of the Peerses' financial interest in receiving per ton mining royalties when it first purchased their properties:

> *607 (a) Since the early 1900s, the Peers family used its land in Louisa County for commercial purposes, (Tr. at 496-526);
>
> (b) When Grace approached M.F. Peers in 1972 and A.D. Peers in 1973, it told them it sought to buy their properties in order to mine them, (*e.g.*, Tr. At 536-37);
>
> (c) Given their background, the Peerses agreed, and sold their land to Grace with the expectation of receiving royalties from the mining, (Tr. at 536-37; PTX 45);
>
> (d) Grace entered into detailed agreements with the Peerses pursuant to which Grace would pay them "per ton" royalties if Grace, in its sole discretion, decided to mine the properties, (Stip. ¶¶ 28, 32-34);
>
> (e) Notwithstanding the discretionary clauses, Grace promised M.F. Peers that it was going to mine his property within two years, and knew of the Peerses' expectations that the properties would be mined. (Tr. at 536-38; PTX 45 at B0184 ("We recognize that . . . you had expectations at the time your brother's property was sold to Grace . . . that mining would take place.").)

129. Grace intentionally disregarded the Peerses' financial interest when it donated the Peerses' properties to HGSI:

(a) Instead of mining the Peerses' properties as it had promised, Grace donated the properties to HGSI—an organization that Grace knew had opposed mining for two decades—and included restrictive covenants in the donation deeds with the specific intent that no subsequent purchaser or lessee be able to mine the properties;

(b) Before the donations were announced, Grace knew that donating the properties to HGSI would foreclose the possibility that the properties would be mined, and that, therefore, the donations would frustrate the financial interest of property owners such as the Peerses, to whom Grace had promised "per ton" mining royalties. This knowledge was established by Grace's awareness of its own obligations under its various agreements; Grace's recognition that donating the properties to an anti-mining organization carried the potential disadvantage of "legal action" by those property owners, (PTX 351); and Mr. Walsh's memorandum of September 17, 1992, which informed Mr. Kohnken that "there are property owners who have vermiculite deposits who consider Ely to be a meddling devil," (PTX 321);

(c) Ms. Ely also knew the Peerses' financial interests would be injured by the donations with covenants not to mine. On cross-examination she admitted knowing that

the M.F. Peerses had a financial interest in having their former property mined, (Tr. at 2077); that imposing restrictive covenants not to mine was more injurious than Grace simply retaining the properties without mining them, (Tr. at 2078); and that she was sure the Peerses were "very unhappy" when they learned about the donations to HGSI. (Tr. At 2073.) Moreover, Grace had sent Ms. Ely copies of its leases and mining agreements with the various Louisa County landowners on September 23, 1992. (PTX 324.)

**52 130. Additional evidence of Grace's disregard of the M.F. Peerses' financial interest includes the following:

(a) M.F. Peers's sale price was lower than it otherwise would have been, to take account of the royalties that he expected to receive, (Tr. at 537-37);

(b) When Mr. Poling visited M.F. Peers in September 1992, M.F. Peers told him that Grace either should mine the M.F. Peers parcels or sell them to someone who would mine them, (Tr. at 538-39);

(c) Although by this time Grace already had decided to donate the Peerses' properties to HGSI, Mr. Poling told M.F. Peers he still thought the property might be *608 mined, (Tr. at 538), and did not mention that Grace was planning to donate the property to HGSI, (Tr. at 539);

(d) Grace did not notify the Peerses of its intent to donate the properties until Mr. Poling unexpectedly telephoned M.F. Peers on the morning of the public announcement,

and did not inform them of the donation itself until after the deed already had been executed, (PTX 43);

(e) The M.F. Peers donation deed contained detailed restrictive covenants that prohibited the property from being mined; and

(f) Grace never mined the M.F. Peers properties or paid any royalty to the M.F. Peerses. (Stip. ¶ 29.)

131. Additional evidence of Grace's intentional disregard of the A.D. Peerses' financial interest includes the following:

(a) Despite having previously made advanced royalties payments to the A.D. Peerses, those payments apparently ended after the donations were made, as one of Grace's motives in donating the properties was to reduce its carrying costs;

(b) On October 16, 1992, the A.D. Peerses wrote to Grace, stating that because Grace was not going to mine the property, they wished to exercise their right to buy back Parcel A, (PTX 330);

(c) The A.D. Peerses sought to buy back Parcel A to sell or lease it to a third party that would mine it;

(d) On October 27, 1992, Grace responded, assuring A.D. Peers that it had not yet finalized plans to donate the A.D. Peers property to HGSI, and informing him that he therefore could not buy back Parcel A, (PTX 329, 332);

(e) Contrary to its representations to A.D. Peers, Grace already had decided by this time to donate the A.D. Peers property to HGSI, and to include restrictive covenants not to mine in the deed of gift;

(f) On November 13, 1992, A.D. Peers wrote a letter to Grace, expressing relief at Grace's assurances that it had not yet had definitive discussions with HGSI about the donations;

(g) Grace disregarded A.D. Peers's letter, deciding not to respond until Grace determined whether VVL's Brandy B permit carried enough restrictions to make a delay of the A.D. Peers donation worthwhile, (PTX 332);

(h) Grace and HGSI entered into an understanding to delay the donation of the A.D. Peers property, (*see supra*);

(i) On August 16, 1993, M.F. Peers wrote to Mr. Grace out of "desperation and anger," essentially begging Grace not to donate the A.D. Peers property to HGSI, a group they had "fought for 20 years," because the Peerses wanted the property to be mined, (PTX 44);

**53 (j) Grace disregarded this plea, and three months later, (once the *Brandy* decision ensured that VVL would have enough reserves to stay in business in Virginia), Grace gave notice to the A.D. Peerses that it intended to donate the A.D. Peers property to HGSI, (Stip. ¶ 87);

(k) When the A.D. Peers property ultimately was transferred in 1994, Grace and HGSI had an understanding that HGSI would prevent the mining of the A.D. Peers property to the same extent called for by the written restrictive covenants; and

(l) Grace never mined the A.D. Peers properties or paid a per ton royalty to the A.D. Peerses for vermiculite actually mined. (Stip. ¶ 38.)

132. When the agreement to delay the A.D. Peers donation is reduced to its essence, it appears to have been designed *609 specifically to frustrate A.D. Peers's interest in obtaining mining royalties from his property. A.D. Peers intended to satisfy that interest by calling upon Grace's competitor to mine the property, which is what Grace took measures to prevent. (PTX 331, 402.) Therefore, Grace not only intentionally disregarded A.D. Peers's financial interest, but acted with the specific intent that his financial interest be frustrated. Such conduct is a nearly perfect example of a breach of the duty of good faith and fair dealing.

133. All of this evidence established by clear and convincing evidence that when Grace donated the Peerses' properties to HGSI, Grace acted in furtherance of its own interest, with intentional disregard of the financial interest of the A.D. Peerses and M.F. Peerses.

134. Therefore, Grace exercised its contractual discretion in bad faith when it donated the A.D. Peers and M.F. Peers properties to HGSI, and the means by which those donations were executed was unlawful.

135. The court concludes that VVL proved by clear and convincing evidence that HGSI and Grace combined, associated, agreed, mutually undertook or concerted together for the purpose of willfully and maliciously injuring VVL in its reputation, trade, business, and

profession, and that they did so by unlawful means. *See* Va. Code § 18.2-499. The final question is whether this joint undertaking caused VVL any injury, as is required to establish civil liability pursuant to § 18.2-500.

C. CAUSATION AND INJURY

136. Under the Virginia Conspiracy Act, the plaintiff must show the defendants' concerted action caused it injury in order to be entitled either to damages under § 18.2-500(a) or to injunctive relief under § 18.2-500(b). *See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522, 527 (4th Cir. 1998) ("CQC was liable for statutory conspiracy if clear and convincing evidence showed that . . . the conspiratorial actions of CQC and one or more of the other defendants caused Adelphia to suffer damages."); *Advanced Marine Enters., Inc. v. PRC Inc.*, 501 S.E.2d 148, 158 (Va. 1998) ("[S]ubsection (b) does not expressly refer to a 'person who shall be injured in his reputation, trade, business or profession by reason of a violation of § 18.2-499,' yet this requirement is clearly a predicate for recovery under the statute inequity, as well as in law."); *CaterCorp, Inc. v. Catering Concepts, Inc.*, 431 S.E.2d 277, 282 (Va. 1993) ("[T]he plaintiff may be entitled to an injunction if it proves . . . the conspiracy involving defendants and that, because of Henicheck's affiliation with defendants, plaintiff will suffer irreparable injury . . . ."); *Eshbaugh v. Amoco Oil Co.*, 360 S.E.2d 350, 351 (Va. 1987) (noting, for statute of limitations purposes, that "a cause of action for conspiracy under Code § 18.2-500 accrues when one is 'injured in his . . . business'" (quoting *Gallop v. Sharp*, 19 S.E.2d 84, 86 (Va. 1942)); *Allen Realty Corp. v. Holbert*, 318 S.E.2d 592, 596 (Va. 1984) ("To recover in an action for conspiracy to harm a business, the plaintiff must prove . . . resulting damage . . . ."); *Nida v. Business Advisory Sys., Inc.*, 44 Va. Cir. 487, 499-500 (1998), *reprinted at* 1998 Va. Cir. LEXIS 22 (same).

**54 137. As stated by the Supreme Court of Appeals of Virginia:

> The gist of the civil action of conspiracy is the damage caused by the acts committed in pursuance of the formed conspiracy and not the mere combination of two or more persons to accomplish an unlawful purpose or use unlawful *610 means. In other words, the basis of the action is the wrong which is done under the conspiracy and which results in damage to the plaintiff. No cause of action exists without the resulting injury, and the damage produced must arise as the effective result of the conspiracy.
>
> *Gallop v. Sharp*, 19 S.E.2d 84, 86 (Va. 1942).

138. Because VVL failed to establish by a preponderance of the evidence that HGSI's and Grace's concerted actions caused, threatened to cause, or will cause VVL to suffer any injury, *see supra*, VVL failed to establish the same by clear and convincing evidence.

139. The findings of fact and conclusions of law recited *supra* demonstrate that although Grace and HGSI acted in concert to injure VVL in its reputation, trade, business, and profession, VVL did not satisfy its burdens of proving that Grace intended to monopolize a discernable part of interstate commerce, or that Grace's and HGSI's concerted actions injured VVL or harmed competition.

140. On reading the Findings of Fact for the case, one develops an intuitive conclusion that the plaintiff will prevail. It is only upon a consideration of the relevant statutes, and of the cases which have interpreted and applied those statutes, that the conclusion set out herein in favor of the defendant is properly reached, contrary to that intuitive thought the result may be.

141. The court accordingly concludes that:

(1) HGSI is not liable for conspiring to monopolize in violation of the Sherman Act, 15 U.S.C. § 2;

(2) HGSI is not liable for conspiring to monopolize in violation of the Virginia Antitrust Act, Va. Code § 59.1-9.6; and

(3) HGSI is not liable for conspiring to injure VVL in its reputation, trade, business, or profession, in violation of the Virginia Conspiracy Act, Va. Code §§ 18.2-499, -500.

Pursuant to Federal Rule of Civil Procedure 58, final judgment shall be entered by separate order contemporaneously herewith.

ENTERED: /s/ James H. Michael, Jr.
James H. Michael, Jr.
Senior United States
District Judge

TABLE 1
NORTH AMERICAN VERMICULITE CONCENTRATE SALES

Short Tons

	1991	1992	1993	1994
VVL	30,423	35,206	33,895	40,270
CVC	23,432	22,208	26,628	31,388
VVL/CVC Total	53,855	57,414	60,523	71,658
Grace External	35,350	42,096	49,578	48,383
Grace Internal	50,807	61,691	57,703	51,239
Grace Total	86,157	103,787	107,281	99,622
Total Imports	40,783	45,460	41,801	46,763
Total Sales	180,795	206,661	209,605	218,043

TABLE 1
NORTH AMERICAN VERMICULITE CONCENTRATE SALES

Short Tons [continued]

	1995	1996	1997	1998
VVL	44,342	41,967	44,579	49,091
CVC	30,034	31,120	33,206	31,399
VVL/CVC Total	74,376	73,087	77,785	80,490
Grace External	47,304	46,520	47,600	44,786
Grace Internal	49,279	40,705	55,422	60,043
Grace Total	96,583	87,225	103,022	104,829
Total Imports	61,638	59,882	77,222	85,605
Total Sales	232,597	220,194	258,029	270,924

United States District Court, W.D. Virginia,
Charlottesville Division.

VIRGINIA VERMICULITE, LTD.,
Plaintiff,

v.

W.R. GRACE & CO.-CONN., and
The Historic Green Springs, Inc.,
Defendants.

Virginia Vermiculite, Ltd.,
Plaintiff,

v.

W.R. Grace & Co.-Conn.,
Defendant.

M.F. Peers, Jr., Norma Peers, and
Virginia Vermiculite, Ltd.,
Plaintiffs,

v.

W.R. Grace & Co.-Conn.,
Defendant.

Civil Action Nos. 3:96CV00012, 3:96CV00013, 3:95CV00015.

[Entered: July 26, 2000]

MEMORANDUM OPINION

MICHAEL, Senior District Judge.

**1These consolidated actions come before the court on cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Having thoroughly considered the substantial briefing and evidence provided by the parties, and having heard oral argument from counsel on the motions, and for the reasons hereinafter set forth, the court shall **554 GRANT the plaintiffs' motion in part, DENY the plaintiffs' motion in part, GRANT the defendants' motions in part, and DENY the defendants' motions in part. As a result of this Memorandum Opinion and Order, the plaintiffs' only claims remaining for trial are: VVL's claim for conspiracy to monopolize pursuant to the Sherman Antitrust Act § 2; VVL's corresponding conspiracy to monopolize claim under the Virginia Antitrust Act; and all of the plaintiffs' non-antitrust state law claims, except for unjust enrichment.

I.

The plaintiffs filed these antitrust cases for violations of sections one and two of the Sherman Antitrust Act, *see* 15 U.S.C.A. §§ 1, 2 (West 1997 & Supp.2000) (" § 1" and " § 2"), and related laws of the Commonwealth of Virginia. The plaintiffs' claims arise out of a series of land donations from defendant W.R. Grace & Co.-Conn. ("Grace"), to defendant The Historic Green Springs, Inc. ("HGSI"), a Virginia nonprofit organization dedicated to the preservation of land in Louisa County, Virginia. Plaintiff Virginia Vermiculite, Ltd. ("VVL"), Grace's competitor, and plaintiffs Millard F. Peers, Jr. and Norma Peers (collectively, "M.F.Peers"), residents of Louisa County, attack the donations, *inter alia*, as conspiratorial efforts to drive VVL out of business, and to restrain trade and monopolize the industry in which VVL and Grace compete.

The following facts are undisputed, unless otherwise noted. VVL is a Virginia corporation engaged in the business of mining, processing, and selling a mineral known as vermiculite. Vermiculite is a naturally-occurring, mica-like mineral found in the ground. When vermiculite is mined, the ore is taken to a processing plant relatively close to the mining site, and processed to remove moisture, rock, dirt, dust, extraneous material, and small particles of vermiculite that are not merchantable. The result of the mining process is vermiculite concentrate, which is separated by grade according to the size of the flakes. The United States grading system classifies vermiculite into three size ranges: grade 3, grade 4, and grade 5. The plaintiffs generally refer to grade 3 as "mid-size" vermiculite concentrate, grade 4 as "small" vermiculite concentrate, and grade 5 as "ultra-small" vermiculite concentrate. The defendants dispute the plaintiffs' classification system. Most applications for vermiculite require that the concentrate be heated, a process known as "exfoliation" or "expansion." This process causes the vermiculite to expand or pop in much the same way as popcorn pops when heated.

Vermiculite is fireproof, and is used in a variety of horticultural, agricultural, industrial, and construction applications. Some of the applications for expanded vermiculite include the production of lightweight concrete, soil mixes, fertilizers, masonry block insulation, and spray-on fireproofing. Vermiculite concentrate is used to produce fire-rated drywall.

**2 Vermiculite is mined in a limited number of specific locations throughout the world, including China, Brazil, Australia, and Russia, and certain countries in Africa. It is imported primarily from companies doing business in South Africa and China. In the United States, vermiculite has been mined only in Virginia, South

Carolina, and Montana, but deposits in Montana previously were found to be contaminated by asbestos fibers. Grace also asserts that vermiculite deposits exist in Colorado, Nevada, North Carolina, Texas, and Wyoming, but VVL claims that these deposits currently are not commercially viable, due in part to their low-quality.

The three largest participants in the world-wide vermiculite industry are the South Africa-based Palabora Mining Company ("Palabora"),[1] Grace, and VVL. Palabora is the largest single producer of vermiculite **555 in the world, and currently has twenty-five years' worth of reserves (sometimes referred to as "mining rights") in Africa. Grace and VVL are the second- and third-largest vermiculite producers in the world, respectively, and until recently, the only American competitors in the vermiculite industry.[2] In 1991, South Africa and China sold approximately 41,000 tons of vermiculite in North America, representing 23% of North American vermiculite sales. Since then, these imports increased substantially, to approximately 86,000 tons in 1998. In 1998, South African and Chinese imports represented approximately 33% of all North American vermiculite concentrate sales. The parties dispute the impact these foreign imports have on the domestic market.

VVL owns mining rights, conducts mining operations, and operates vermiculite processing plants in Virginia and South Carolina. VVL's South Carolina division does not process any vermiculite mined in Virginia. In 1991, VVL sold approximately 57,000 tons of vermiculite

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1 HGSI refers to this company as Rio Tinto PLC.

2 A new entrant in the industry recently began mining operations in Montana.

concentrates in North America. Since then, VVL increased its sales to approximately 80,000 tons in 1998. VVL currently sells approximately 30% of all vermiculite concentrate in North America. At its current production rates, VVL controls enough reserves in Virginia to last until the year 2012. VVL has approximately eight years of additional reserves in South Carolina.

Grace, a Connecticut corporation, currently conducts mining operations only in South Carolina. It previously mined in Montana (but ultimately closed those operations), and never mined in Virginia. However, Grace did control substantial mining rights in Louisa County, Virginia--74-80% of available mining rights in the county--before its donations to HGSI in 1992.[3] The plaintiffs allege that Grace also controlled approximately 82% of the mining rights in South Carolina, with VVL's South Carolina operation controlling the remaining 18%. (The defendants dispute this.) At least 2,000,000 tons of vermiculite reserves in South Carolina remain unleased by any mining company. Grace sells and uses vermiculite internally, and also sells both vermiculite concentrates and expanded vermiculite to third-parties. In 1991, Grace sold 86,157 tons of vermiculite in North America, representing approximately 47% of all North American vermiculite concentrate sales. By 1998, Grace sold approximately 38% of all vermiculite concentrates in North America.

In the 1960s, Grace began exploring the possibility of purchasing vermiculite reserves in Louisa County. At that time, Grace was mining in Montana and in South Carolina, and believed it would need a "third mill" to replace

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[3] The defendants dispute the plaintiffs' figures. Taking into account Grace's reserve estimates, the Brandy B property, and properties to which VVL had access or rights (the Dowell and R.E. Sansom properties), but which VVL claims could not be mined due to zoning ordinances and conservation easements, the low-end figure would be 67%.

depleting reserves or to add to existing reserves. To that end, Grace acquired substantial mining rights in Louisa County throughout the 1970s, either by buying properties containing vermiculite, or by leasing land from Louisa County property owners. [4]

**556 **3 Plaintiff M.F. Peers was one of those property owners. Grace purchased two properties from M.F. Peers on December 27, 1972. The first parcel (sometimes referred to as "Parcel I") contains 262.98 acres, and the second parcel (sometimes referred to as "Parcel II") contains 276.42 acres.[5] Grace purchased these properties for their logistical benefit to a vermiculite mining operation; it did not believe at that time that commercially valuable reserves existed on either parcel. (The parties dispute whether Grace so informed M.F. Peers.) Despite this belief, Grace entered into an agreement with M.F. Peers pursuant to which Grace would pay M.F. Peers "per ton" royalties if Grace, in its sole discretion, decided to mine the properties. Grace never mined the properties or paid a per ton royalty to M.F. Peers.

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4 The following summarizes Grace's 1970s Louisa County transactions. July 20, 1972: Grace acquires JONES properties (7 acres); Dec. 27, 1972: Grace purchases two M.F. PEERS properties (Parcel I: 262.98 acres; Parcel II: 276.42 acres); Aug. 28, 1973: Grace purchases HARRIS properties (5 acres); Nov. 21, 1973: Grace purchases LLOYD I properties (67.175 acres); Dec. 10, 1973: Grace purchases LLOYD II properties (110.33 acres); Dec. 27, 1973: Grace purchases A.D. PEERS properties (Parcel A: 36.62 acres; Parcel B: 228.99 acres); Dec. 27, 1973: Unrecorded agreement for A.D. PEERS royalties; Dec. 27, 1973: Grace leases the BRANDY A ("Hill") property (60.242 acres); June 13, 1974: Grace purchases the DALTON property (12.6 acres); May 17, 1976: Grace leases the NININGER property (255.53 acres). In the 1980s, Grace purchased the CAMERON property (74.027 acres) (Apr. 12, 1982), and the AMCLUB property (13 acres) (May 10, 1989).

5 As amended by the deed of correction dated August, 28, 1972.

Alfred D. Peers (M.F. Peers's brother) and Elizabeth D. Peers, husband and wife (collectively, "A.D.Peers"), also owned land in Louisa County. Grace purchased two parcels from A.D. Peers on December 27, 1973: the 36.62 acre "Parcel A," on which A.D. Peers resided, and the 228.99 acre "Parcel B." An unrecorded agreement entered the same day established a per ton royalty rate that Grace would pay A.D. Peers, in the event that Grace, in its sole discretion, decided to mine the property. Grace believed that the A.D. Peers properties contained commercially valuable vermiculite reserves. Grace never mined the A.D. Peers properties or paid a per ton royalty to A.D. Peers.

J. Murray and Ruth Hill also owned property in Louisa County, known as the "Brandy Farm." On December 27, 1973, Grace leased a 60.24 acre parcel from the Hills known as "Brandy A." Coincidentally, the Hills also lived on a 37-acre parcel. That parcel is known as "Brandy B." Grace entered into an agreement to pay royalties to the Hills if Grace decided to mine Brandy A. Under the agreement, Grace had the duty of maintaining the buildings of Brandy B as long as the Hills lived there. The agreement provided in part that, once the Hills vacated Brandy B, "no person shall use or occupy any of the buildings ... or [Brandy B] without Grace's prior written permission and upon such conditions as Grace may reasonably impose." *Historic Green Springs, Inc. v. Brandy Farm, Ltd.*, 32 Va. Cir. 98, 99 (1993). The Hills notified Grace that its maintenance duties would be triggered on October 1, 1984. Reluctant to assume the added costs of those responsibilities, Grace agreed with Brandy Farm, Ltd. (to which the properties since had been conveyed) to modify the agreement, to permit Brandy, Ltd. to lease the Brandy Farm in its entirety to third parties. *See id.*

On May 17, 1976, Grace leased a 255.53 acre parcel from Elgin H. and Betty Craig Nininger, known as the "Nininger" property. Grace never mined the Brandy or Nininger properties. In 1976, VVL acquired its first property in Louisa County, known as the "Purcell" property. The Purcell property contains 459 acres.

**4 The relative geographic positions of these properties proves to be relevant in this case. The point of reference is Route 22 in Louisa County, which runs east to west. Nininger is located south of Route 22, and all of the other properties are located north of Route 22. Of the northern properties, Purcell is located furthest east. West of Purcell is the M.F. Peers Parcel II. That parcel is a wooded area adjacent to the South Anna River. West of the southern portion M.F. Peers Parcel II are the Brandy parcels. Consequently, M.F. Peers's Parcel II lies directly between the Brandy and Purcell properties. The Brandy properties also lie directly north of the Nininger property, across Route 22. The A.D. Peers properties are **557 situated west of M.F. Peers Parcel II and the Brandy properties. West of A.D. Peers is the other M.F. Peers property, Parcel I.

In 1974, part of Louisa County was designated a national landmark. It is called the Green Springs National Historic Landmark (the "Landmark"). HGSI is a nonprofit organization that is dedicated to the preservation of the Landmark. HGSI's amended 1998 corporate charter states its purposes as follows:

> The Corporation is organized for charitable and educational purposes to maintain and protect the beautiful and historic Green Springs area of Louisa County, Virginia, as an important heritage for the Commonwealth of Virginia and her people, without pecuniary gain or profit to its members or to any private individual and not to engage in a regular business of a kind ordinarily carried on for profit. Its purposes shall include historical and ecological research and education; the development of a community land-use plan to eliminate blight and prevent future deterioration; to take and hold by bequest, devise, gift, grant, purchase, lease or otherwise, any property ... without limitation as to amount or value; to sell, convey, or otherwise dispose of any such property and to invest, reinvest, or deal with the principal or the income thereof in such manner as, in the judgment of the Directors, will best promote the general welfare of the Green Springs National Historic Landmark District without limitation, except such limitations, if any, as may be contained in the instrument under which such property is received ... and rendering assistance to like oriented organizations (historical and environmental).

(Pls.' Opp'n Ex. 16.) Many of the properties Grace acquired in Louisa County were located within, or adjacent to, the Landmark. From the time Grace began acquiring properties in Louisa County, Grace faced substantial opposition to its mining plans from HGSI, specifically from one of its directors, Ms. Rae Ely. Ms. Ely frequently appeared in opposition to Grace at meetings of the Louisa County Board of Supervisors.

Having no other property besides Purcell, VVL began mining in 1976. In 1991, Greg Poling of Grace had a conversation with Ned Gumble of VVL, in which Mr. Gumble expressed VVL's interest in buying or leasing Grace's Virginia reserves. Mr. Poling wrote to his superiors, recommending that negotiations with VVL be pursued. Negotiations took place in mid-1991. Grace did not accept VVL's highest offer of $1.75 million, and the negotiations proved unsuccessful. Through discovery, the parties learned of the other side's negotiation strategies. The lowest price Grace was willing to accept was $2.2 million, which happened to be the highest price VVL was willing to pay.

**5 Following the failed negotiations, VVL sought to acquire more reserves. On April 25, 1992, VVL leased Brandy B from Brandy, Ltd. VVL could not begin mining Brandy B until it acquired a permit to do so from the Louisa County Board of Supervisors.

Also in 1992, Ms. Ely attended Grace's annual shareholder meeting in Florida. She met with Grace's Executive Vice President, Donald Kohnken, and attempted to persuade Grace to abandon any plans to mine in Louisa County. A senior Grace officer, Mr. Walsh, was charged with the responsibility of developing a response to Ms. Ely. Grace analyzed the desirability of its various options: holding its unmined properties in Louisa County, an option that entailed substantial carrying costs (such as property taxes, maintenance expenses, and annual rents of advanced royalties), donating its properties to HGSI, or selling its properties to VVL. After meeting with Mr. Poling, among others, Mr. Walsh ultimately recommended that Grace donate its properties to HGSI.

**558 In late 1992, Grace began transferring its Louisa County properties to HGSI.[6] The first transaction occurred on November 30, 1992. By quit claim deed of gift, Grace conveyed two properties to HGSI, one of which was M.F. Peers Parcel II, the parcel located between the Purcell and Brandy properties. Around the same time, VVL was scheduled to appear at a hearing on its application for a permit to mine Brandy B. The November 30, 1992 deed contained the following restrictive covenants:

> 1. No part of the Real Estate shall ever be used or operated for the purpose of Mining or Mineral Production. The phrase "Mining or Mineral Production," as used herein, shall include, but shall not be limited to, the following:
>
> > a. The extraction, removal or relocation of ores, minerals, stone, gravel and soils (including, but not limited to, vermiculite), regardless of whether or not such material is under, on or above the surface of the Real Estate;

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[6] The following summarizes Grace's post-1991 transactions. Nov. 30, 1992: Grace quit claim deed of gift of M.F. PEERS parcel II to HGSI, and of JONES properties (containing restrictive covenants); Dec. 10, 1992: Drafts of a quit claim deed of gift and assignment of A.D. PEERS properties, including restrictive covenants; Dec. 22, 1992: Grace quit claim deed of gift of Grace's remaining Virginia properties, except A.D. PEERS, to HGSI (including seven parcels--LLOYD I, HARRIS, M.F. PEERS PARCEL I, AMCLUB, DALTON, LLOYD II, CAMERON) (restrictive covenants on all properties); Dec. 22, 1992: Grace assigns NININGER lease to HGSI (express, written prohibitions on mining); Dec. 22, 1992: Grace assigns BRANDY A lease to HGSI (express, written prohibitions on mining); Jan. 25, 1994: Grace deeds back A.D. PEERS "Parcel A" to A.D. Peers; Jan. 31, 1994: Grace quit claim deed of gift of A.D. PEERS "Parcel B" to HGSI (no written restrictive covenants); May 26, 1994: correction of quit claim deed--LLOYD I and HARRIS restrictive covenants modified only to forbid vermiculite mining, not all mining; Dec. 10, 1999: Release of all restrictive covenants by Grace and HGSI.

b. Auger mining, underground mining, strip mining, open pit mining, quarrying, blasting, digging, hydraulic mining, dredging, tunnel mining, deep mining, surfact [sic] mining, placer mining, longwall mining, and any other method of mining not mentioned herein which has been practiced, which is currently practiced or which may be practiced at any time in the future.

2. The Restrictive Covenants shall apply notwithstanding any attempt, whether successful or not, at restoration of the Real Estate through the process of reclamation or any other method which restores the Real Estate to the state in which it existed prior to Mining or Mineral Production.

3. No excavation or grading may be made on the Real Estate except for walls, footings, basements, or cellars which such excavation or grading shall be solely incidental to the erection and construction of residential and agricultural structures on the Real Estate.

**6 4. The Real Estate shall be used solely for agricultural and residential purposes. Digging or plowing incidental only to residential or agricultural purposes shall be permitted.

> 5. Grantor [Grace] covenants and agrees, for itself, its successors in title and interest, and its assigns, that the Restrictive Covenants shall run with the land forever.

(Pls.' S.J. Mem. Ex. 27.) Four days after this conveyance, Ms. Ely of HGSI appeared at a Louisa County Board of Supervisors hearing on VVL's application for a permit to mine Brandy B.

By quit claim deed of gift dated December 22, 1992, recorded December 23, 1992, Grace conveyed to HGSI its remaining Louisa County properties, with the exception of the A.D. Peers property.[7] All of **559 the properties conveyed in December 1992 contained the same restrictive covenants quoted above. Some of those properties were not located in, or adjacent to, the Landmark.

On December 22, 1992, by "Assignment and Acceptance Agreement," Grace assigned its Nininger and Brandy A leases to HGSI. Each of those leases contained the following provision:

> 5. Assignor and Assignee acknowledge that the Agreement creates no obligation upon Assignor to mine the Premises. Assignee, by acceptance of this Assignment, agrees not to mine the Premises and shall exert reasonable efforts to prevent mining on the Premises during the term of the Leasehold Estate created by the Lease Document.

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[7] The December 22, 1992 conveyance included the other M.F. Peers property (Parcel I), and the Lloyd I, Lloyd II, Harris, Amclub, Dalton, and Cameron properties. *See* note 6 *supra*.

(Pls.' S.J. Mem. Ex. 32.) VVL received its permit to mine Brandy B in January 1993. The permit did not restrict the amount of reserves that could be mined.

In June 1993, HGSI filed a lawsuit in the Circuit Court of Louisa County against VVL, to enjoin VVL and Brandy, Ltd. from mining Brandy B (sometimes referred to as the "*Brandy* suit"). *See Historic Green Springs, Inc. v. Brandy Farm, Ltd.*, 32 Va. Cir. 98 (1993). HGSI contended that Grace's original 1973 Brandy A agreement with the Hills gave the lessee of Brandy A (Grace, and then HGSI) discretion to determine whether mining could occur both on Brandy A and on Brandy B. *See id.* at 101. VVL and Brandy, Ltd. filed a counterclaim, alleging that Grace's Brandy A donation to HGSI breached Grace's duty to the Hills (Brandy, Ltd.), to exercise its contractual discretion (whether to commence mining) in good faith, by assigning the lease with a non-mining provision to a company with no mining expertise. During the pendency of the lawsuit, the court (sometimes referred to as the "*Brandy* court") issued a temporary injunction, which enjoined VVL from mining Brandy B. However, HGSI did not pay the required bond, so the injunction was not effective. On September 28, 1993, the *Brandy* court found that the modification of the 1973 agreement "gave Brandy the right to exercise unfettered control over the entire property, in exchange for which Brandy released Grace from the obligation to maintain and secure the property." *Id.* at 104. The court therefore denied HGSI's claim. The court also found in favor of VVL on its counterclaim, and rescinded the donation. HGSI appealed, but the Virginia Supreme Court denied HGSI's petition on June 20, 1994. Brandy, Ltd. subsequently leased Brandy A to VVL, leaving VVL at liberty to mine both Brandy properties, which it did from 1994 forward.

On December 13, 1993, Grace gave notice to A.D. Peers that it intended to donate the A.D. Peers property to HGSI. Pursuant to a provision in the original 1973 agreement between A.D. Peers and Grace, A.D. Peers had the option of buying back the 37 acre Parcel A in the event that Grace "resold" the property. On January 25, 1994, Grace deeded Parcel A back to A.D. Peers.

**7 Six days later, by deed dated January 31, 1994, Grace conveyed the A.D. Peers Parcel B to HGSI. This conveyance was made subject to the terms of the unrecorded December 27, 1973 agreement between A.D. Peers and Grace, pursuant to which Grace agreed to pay per ton vermiculite mining royalties to A.D. Peers. The January 31, 1994 deed contained no written restrictive covenants not to mine.

By "Correction Quit Claim Deed of Gift," recorded May 26, 1994, Grace and HGSI revised the restrictive covenants of the Lloyd I and Harris properties, originally conveyed as part of the December 22, 1992 donations. The correction **560 replaced the general prohibition of any type of mining with a restriction that prohibited only the mining of vermiculite. It reads, in relevant part:

> 1. No part of the Real Estate shall ever be used or operated for the purpose of Vermiculite Mining. The phrase "Vermiculite Mining," as used herein, shall include, but shall not be limited to, the following:
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> a. The extraction, removal or relocation of vermiculite ores, regardless of whether or not such material is under, on or above the surface of the Real Estate;

> b. Auger mining, underground mining, strip mining, open pit mining, quarrying, blasting, digging, hydraulic mining, dredging, tunnel mining, deep mining, surface mining, placer mining, longwall mining, and any other method of mining not mentioned herein which has been practiced, which is currently practiced or which may be practiced at any time in the future for the removal of vermiculite ores for the production of vermiculite or vermiculite products.

(Pls.' S.J. Mem. Ex. 40.)

VVL exhausted its Purcell reserves at some point in 1994, but in September of that year, A.D. Peers entered into an agreement with VVL whereby VVL would be permitted to mine Parcel A. In or around May 1995, HGSI stopped making payments on its Nininger lease and the lease was terminated. The Nininger property contains approximately 700,000 tons--representing eight to twelve years' worth--of vermiculite reserves. The property is zoned for vermiculite mining. Since May 1995, Nininger has been, and remains, unleased by any mining company. The Nininger property represents more than one-third of the reserves that VVL originally offered to purchase from Grace.

In 1995 and 1996, the plaintiffs filed three separate actions against the defendants in the Western District of Virginia, which were consolidated in the present case. The plaintiffs complained that the 1992 and 1994 donations from Grace to HGSI removed over 80% of vermiculite mining rights from the "Louisa County mining rights market," from 1993 to mid-1994. VVL claims it participates in that market as a buyer of mining rights in Louisa County. The plaintiffs

also allege that the transactions foreclosed over 40% of the raw vermiculite concentrate in the "North American vermiculite concentrates market," from 1993 to mid-1994. According to the plaintiffs, the donations and restrictive covenants prohibiting all future mining of vermiculite evidence a conspiracy between Grace and HGSI to restrain trade in the Louisa County mining rights market. The plaintiffs complain that the alleged conspiracy between Grace and HGSI, in which they agreed (expressly or implicitly) that no vermiculite mining will occur, hinders VVL (or other potentially interested parties) from acquiring Louisa County vermiculite mining rights, and forecloses the supply of raw vermiculite from Louisa County. The donations, the plaintiffs assert, were exclusionary acts employed by Grace, by which Grace achieved (or attempted to achieve) monopoly power in the North American vermiculite concentrates market. VVL alleges that the donations also evidence a conspiracy, entered into between both defendants, to monopolize the same. VVL claims that the Grace-HGSI transactions caused it to suffer increased costs and lost profits. As a remedy, VVL seeks damages for past and future harm, and equitable relief entailing rescission of the conveyances and divestiture of Grace's property interests. The Peers seek lost royalties. Their primarily ground for relief is that Grace violated its duty to exercise discretion in good faith when it donated the Peers' properties to an organization that is opposed to mining. The Peers claim the donations defeated the original purpose of their contracts with Grace, and injured their reasonable expectations under those **651 contracts, because they sold their land to Grace in exchange for the possibility of obtaining per ton mining royalties.

**8 In Civil Action No. 3:95CV0015, filed February 21, 1995, VVL sued both Grace and HGSI. Count I alleges that both defendants entered into an agreement that restrained trade in violation of § 1 of the Sherman Act;

Count II alleges monopolization by Grace in violation of § 2 of the Sherman Act; Count III alleges attempted monopolization by Grace in violation of § 2 of the Sherman Act; Count IV alleges conspiracy to monopolize in violation of § 2 of the Sherman Act against both defendants; Count V alleges violations by both defendants of the Virginia Antitrust Act, *see* Va.Code §§ 59.1-9.1 *et seq.* (Michie 1998 & Supp.1999); and Count VI alleges both defendants conspired to injure another in trade, business, or profession, in violation of the Virginia Conspiracy Act, *see* Va.Code §§ 18.2-499, -500 (Michie 1996 & Supp.1999).

In Civil Action No. 3:96CV0012, filed March 12, 1996, VVL lodged a complaint against Grace on behalf of A.D. Peers, who assigned his claims to VVL. Counts I through V allege non-antitrust state law claims for unjust enrichment, breach of Grace's contractual duty to exercise discretion in good faith, breach of Grace's contractual duty to pay royalties to A.D. Peers, waste, and conversion, respectively. Counts VI through IX allege federal and state antitrust violations, including violation of § 1 of the Sherman Act, monopolization and attempted monopolization in violation of § 2 of the Sherman Act, and violations of corresponding provisions of the Virginia Antitrust Act.

In Civil Action No. 3:96CV0013, also filed March 12, 1996, M.F. Peers and VVL sued Grace. M.F. Peers assigned a 65% interest in his claims to VVL. Counts I to V allege non-antitrust state law claims for unjust enrichment, breach of Grace's contractual duty to exercise discretion in good faith, breach of Grace's contractual duty to pay royalties to M.F. Peers, waste, and conversion, respectively. Counts VI to IX allege federal and state antitrust violations, including violation of § 1 of the Sherman Act, monopolization and attempted monopolization in violation of § 2 of the Sherman Act, and violations of corresponding provisions of the Virginia Antitrust Act.

On April 22, 1997, the court granted in part the defendants' motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The court dismissed all claims against HGSI on the ground that, as a nonprofit organization engaged in non-commercial activities, HGSI was exempt from liability under the Sherman Act. *See Virginia Vermiculite, Ltd. v. W.R. Grace & Co.Conn.*, 965 F.Supp. 802, 816 (W.D.Va.1997). The Fourth Circuit Court of Appeals reversed in part, holding, *inter alia*, that it is the nature of the transaction, not the nature of the party to the transaction, that determines whether that party may be liable under the Sherman Act. *See Virginia Vermiculite, Ltd. v. W.R. Grace & Co.Conn.*, 156 F.3d 535, 541 (4th Cir.1998). The court of appeals further found that the plaintiffs' complaints sufficiently alleged that the transactions between HGSI and Grace were "essentially commercial," subjecting both parties to the antitrust laws. *See id.*

On December 10, 1999, Grace and HGSI executed two "Releases of Restrictive Covenants" with respect to each of the properties donated to HGSI that included restrictive covenants. The releases included the restrictions on the M.F. Peers properties, and provide that Grace, "without any admission of liability and wrongdoing ... does declare the Restrictive Covenants to be null and void, and of no further force and effect, and releases the same to the full extent permitted by law." (Grace S.J. Mem. Ex. 19 at 4.)

**9 Less than two weeks later, on December 22, 1999, all of the parties filed motions for summary judgment. The following summarizes the general issues on which the **562 motions are based. Grace and HGSI seek summary judgment on all the plaintiffs' federal antitrust claims. HGSI also moves the court to find that, as a nonprofit preservationist organization engaged in non- commercial activity, and pursuant to the provisions of the National Environmental Policy Act, *see* 42 U.S.C.A. § 4321 (West 1994

& Supp.2000), and the National Historic Preservation Act, *see* 16 U.S.C.A. § 470 (West 1985 & Supp.2000), HGSI should not be subject to treble damages under the Sherman Act. The plaintiffs crossmove for summary judgment on these exemption issues. The plaintiffs and HGSI cross-move for summary judgment on HGSI's First Amendment affirmative defense. In addition, the plaintiffs seek summary judgment on HGSI's "SLAPP suit" affirmative defense, and HGSI seeks summary judgment based on laches and unclean hands. The defendants also move for summary judgment on all of the plaintiffs' state law claims. The plaintiffs cross-move on the state antitrust claim corresponding to § 1, on VVL's Virginia Conspiracy Act claim, and on the Peers' claims regarding Grace's duty to exercise discretion in good faith. The court shall resolve these issues *seriatim*.

On May 4, 2000, the court granted HGSI's motion to exclude the report and testimony of the plaintiffs' only proposed expert on antitrust economics, Mr. Seth Schwartz. *See Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 98 F.Supp.2d 729 (W.D.Va.2000). As a result, the defendants' principal ground for summary judgment is that, without an expert who can provide testimony on economic issues, there is an absence of evidence to support an essential element of the plaintiffs' antitrust claims, *i.e.* the requirement that the plaintiffs define the relevant market in which they allege the wrongful conduct occurred.

II.

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). Issues of material fact are genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The court's function is "not ... to weigh the evidence and determine the truth of the matter ... [but to] determin[e] whether there is a need for a trial." *Id.* at 249-50, 106 S.Ct. 2505. "[O]n summary judgment motions in antitrust cases, the Supreme Court has instructed that when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence." *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4th Cir.1995) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). The party moving for summary judgment has the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions" of the record showing the absence of a genuine issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

**10 When the nonmovant bears the burden of persuasion at trial, the movant may discharge its initial burden either by providing evidence that negates an essential element of the opposing party's case, *see id.* at 331, 106 S.Ct. 2548 (Brennan, J., dissenting) (agreeing with the legal reasoning of the majority, and elaborating on the parties' respective burdens of proof), or "by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325, 106 S.Ct. 2548. If the movant does not satisfy its burden, summary judgment must be denied. If the movant does satisfy its burden, then the burden shifts to the nonmoving party **563 to present evidence "sufficient to establish the existence of [every] element essential to that [nonmoving] party's case, for which that [nonmoving] party will bear the burden of proof at trial." *Id.* at 322, 106 S.Ct. 2548. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders

all other facts immaterial." *Id.* at 323, 106 S.Ct. 2548. "If the [nonmoving party's] evidence is ... not significantly probative ... summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). There must be more than a mere "scintilla" of evidence to support the other party's case. *See Anderson*, 477 U.S. at 252, 106 S.Ct. 2505.

**10 When the movant bears the burden of persuasion at trial, as is the case when a plaintiff moves for summary judgment on its own claims, the movant not only must satisfy the initial burden of production on the summary judgment motion by identifying the evidence "which it believes demonstrate[s] the absence of a genuine issue of material fact," *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548, but also the ultimate burden of persuasion on the claim itself by "support[ing] its motion with credible evidence--using any of the materials specified in Rule 56(c)--that would entitle it to a directed verdict if not controverted at trial." *Id.* at 331, 106 S.Ct. 2548 (Brennan, J., dissenting). If the movant makes such an affirmative showing, the burden then shifts to the nonmovant to "set forth specific facts showing that there is a genuine issue for trial" on those claims. Fed.R.Civ.P. 56(e).

A. SHERMAN ACT § 1

Section one of the Sherman Act provides: "Every contract, combination ... or conspiracy, in restraint of trade or commerce among the several States ... is declared to be illegal." 15 U.S.C.A. § 1 (West 1997). To establish a § 1 violation, the plaintiffs ultimately must prove four essential elements: (1) the defendants entered into an unlawful

contract, combination, or conspiracy; (2) the objects and conduct pursuant to the conspiracy were illegal;[8] (3) the conspiracy imposes an unreasonable restraint on trade; and (4) the concerted action caused "antitrust injury." *See Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 702, 708 (4th Cir.1991); *Terry's Floor Fashions, Inc. v. Burlington Indus., Inc.*, 763 F.2d 604, 610 n. 10 (4th Cir.1985). The court must determine whether triable issues exist as to each of these elements. *See M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 163 (4th Cir.1992).

1. EVIDENCE OF A CONTRACT, COMBINATION, OR CONSPIRACY

**11 The defendants contend that the plaintiffs do not have sufficient evidence to establish a contract, combination, or conspiracy under § 1. This element distinguishes between independent and concerted action. "Concerted action is the essence of a section 1 claim." *Terry's Floor Fashions*, 763 F.2d at 611. To survive summary judgment on this element, the plaintiffs have "a twofold evidentiary burden." *Laurel Sand & Gravel, Inc. v. CSX Trans., Inc.*, 924 F.2d 539, 543 (4th Cir.1991). First, they must present direct or circumstantial evidence that reasonably tends to prove that the defendants "had a **664 'conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)). Second, this evidence must "tend[ ] to exclude the possibility that the alleged conspirators acted independently," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)

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[8] Following *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc.*, 924 F.2d 539, 543 (4th Cir.1991), this court will address the second element in its consideration of whether the plaintiffs have evidence that excludes the possibility that the defendants acted with a legitimate business purpose, under the first element.

(quoting *Monsanto*, 465 U.S. at 764, 104 S.Ct. 1464) (internal quotation marks omitted), or "based upon a legitimate business purpose." *Laurel Sand & Gravel*, 924 F.2d at 543.

(A) EVIDENCE OF A CONSCIOUS COMMITMENT TO A COMMON SCHEME, DESIGNED TO ACHIEVE AN UNLAWFUL OBJECTIVE

The plaintiffs allege that Grace's donations to HGSI, combined with either written or unwritten *(sub rosa)* agreements not to mine, constitute a contract, combination, or conspiracy to restrain trade in the Louisa County, Virginia, mining rights market. *See Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 156 F.3d 535 (4th Cir.1998) (noting that the plaintiffs "alleged that the *entire* transaction between Grace and HGSI--comprising both the donation of the lands and the nonmining agreements--constituted such an agreement, combination, or conspiracy" (emphasis in original)). The plaintiffs further claim that the conspiracy was designed "to prevent VVL or any other competitor of Grace from acquiring further mining rights in Louisa County, and thereby eventually stop vermiculite mining in Louisa County," (Pl.'s 3d Am. Compl. ¶ 39), and "to permanently foreclose significant sources of supply of raw vermiculite to VVL or any other firm competing with Grace in the production and sale of vermiculite concentrates, and eventually to foreclose to rivals all supply of raw vermiculite in Louisa County," (Pl.'s 3d Am. Compl. ¶ 40).

The plaintiffs intend to prove that Grace and HGSI entered into a contract, combination, or conspiracy to restrain trade by providing evidence of: (1) Grace's 1992 donation of the M.F. Peers properties to HGSI with restrictive covenants not to mine; (2) Grace's 1992 donation of its remaining properties in Louisa County (except the

A.D. Peers property) to HGSI with restrictive covenants not to mine; (3) Grace's 1992 assignment of the Brandy A lease to HGSI with restrictive covenants not to mine; (4) Grace's 1992 assignment of the Nininger lease to HGSI with restrictive covenants not to mine; (5) Grace's 1994 donation of the A.D. Peers Parcel B property to HGSI with an accompanying *sub rosa* agreement not to mine Parcel B; and (6) a *sub rosa* agreement between Grace and HGSI to prevent VVL from mining its own property, Brandy B.

(1) 1992 DONATIONS

**12 All of the 1992 donations from Grace to HGSI--both the deed donations and lease assignments--contained express restrictive covenants not to mine the donated properties. The quit claim deeds of gift of nine parcels [9] contained restrictive covenants that provided: "No part of the Real Estate shall ever be used or operated for the purpose of Mining or Mineral Production ... including, but not limited to, [the extraction, removal, or relocation of] vermiculite...." (Pls.' S.J. Mem. Exs. 27, 30.) The 1992 lease assignments contained a similar provision: "[HGSI] agrees not to mine the Premises and shall exert reasonable efforts to prevent mining on the premises...." (Pls.' S.J. Mem. Ex. 32.)

Grace concedes that the donations containing these restrictions satisfy the concerted action requirement of § 1. HGSI, however, argues that there is no evidence of concerted action besides the deeds **565 themselves, and that merely engaging in these transactions is not evidence of concerted action. This argument ignores that these deeds and lease assignments do not simply evidence an agreement to transfer property rights; they also evidence an explicit agreement between the parties to prevent mining on the

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[9] *See* note 6 *supra*

properties. Evidence of the donations containing restrictive covenants alone satisfies the plaintiffs' burden of producing sufficient evidence to establish concerted action under § 1.[10]

(2) 1994 A.D. PEERS DONATION

Although Grace concedes that the donations with restrictive covenants satisfy the concerted action requirement, it argues that the plaintiffs have no evidence that Grace's 1994 donation of the A.D. Peers Parcel B property was accompanied by a *sub rosa* agreement between the defendants to prevent mining on the same. The defendants contend that such an agreement is inconsistent with the Parcel A buy-back provision, and also refer to the deposition testimony of HGSI's president, Ms. Ely, denying the existence of such an agreement. Therefore, both defendants contend that the plaintiffs should be prevented from making this argument at trial.

The court is not convinced that the plaintiffs have no evidence of an A.D. Peers *sub rosa* agreement. On the contrary, there is substantial evidence that such an agreement does exist. The plaintiffs produced evidence that Grace issued a September 29, 1992 press release announcing a package of donations to HGSI, and that the original drafts of the 1992 donations included A.D. Peers among the donations subject to the written restrictive covenants. VVL produced a letter from HGSI to Grace indicating that the only reason the written restrictive covenant was abandoned from the A.D. Peers property was because the *Brandy* decision made clear that such written restrictions would not survive judicial scrutiny. A reasonable jury could conclude

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10 The defendants argue that all the restrictive covenants now have been released. However, the timing of the releases, less than two weeks before the defendants filed their original motions for summary judgment, could lead a reasonable trier of fact to conclude that the releases were not genuine and that a *sub rosa* understanding to prevent mining on the properties continues between the parties to this day.

from this letter that the restriction itself was not abandoned, but only the written memorialization of that restriction.

The plaintiffs also have evidence that the only reason the A.D. Peers donation did not occur with the rest of the 1992 donations was because HGSI and Grace agreed to delay the donation in an attempt to injure VVL. The 1973 agreement relating to A.D. Peers's original sale of his properties to Grace included a provision whereby A.D. Peers had the option of buying back Parcel A of that property if Grace gave notice of its "intent to resell" the entire A.D. Peers property to a third party. The plaintiffs argue that the reason Grace did not donate the A.D. Peers property to HGSI in 1992 was because Grace believed that if the buy-back provision were exercised, VVL would acquire the mining rights on Parcel A (as it ultimately did). The plaintiffs produced a Grace document to support their argument, which reads in part:

> **13 Grace did not donate ... [A.D. Peers] to [HGSI] because of an option which Peers holds to purchase back 37 acres designated as Parcel "A" if Grace sold the property ... Parcel "A" is thought to contain vermiculite reserves which Peers could lease to Virginia Vermiculite if he exercised the option to purchase the parcel.

(Letter from G.E. Poling to R.C. Walsh (Feb. 23, 1993), Pls.' Reply Mem. Ex. 2.; *see also* Ex. 4 ("If Grace offered to sell [A.D. Peers's] property back he would have, in turn, sold it or leased vermiculite rights to Virginia Vermiculite. Thus, the mining of the Louisa, Virginia area would continue for many more years by our competitor.").) VVL argues that the defendants **566 delayed the A.D. Peers donation (and thus prevented VVL from mining Parcel A) to determine whether they could "starve" VVL out of reserves. In late 1992, VVL was attempting to procure permits to mine

Brandy B, at that time its only other reserve besides Purcell. Whether a delay of the A.D. Peers donation would be effective depended on how long VVL's permit would allow VVL to mine Brandy B. The plaintiffs produced several internal Grace memoranda which suggest this is exactly what Grace intended. One memorandum states, in relevant part:

> Given the impact permits could have on the [Brandy B] reserves (two years versus ten years), I propose we enter into an understanding with [HGSI] to delay the donation of the Alfred Peers Property until such time as the permits are granted on [Brandy B] property. If the permits restrict [VVL] to a few years of reserves, a multi-year delay on donating Peers could assure [VVL] does not mine Parcel "A" as well.

** **14** (Letter from G.E. Poling to R.C. Walsh (Nov. 10, 1992), Pls.' S.J. Mem. Ex. 24.) VVL also provided a memorandum indicating that once VVL obtained a permit to mine Brandy B, Grace no longer thought it important to withhold the A.D. Peers donation:

> The availability of Parcel "A" to Virginia Vermiculite was deemed significant only if Virginia Vermiculite's efforts to open a new mine on the adjacent [Brandy B] property was severely restricted by the pending use permit. A conditional use permit has subsequently been granted to Virginia Vermiculite which will not limit their mining activities substantially.
>
> ... I recommend that we ... proceed with the donation of the Peer's [sic] property to [HGSI].

(Letter from G.E. Poling to R.C. Walsh (Feb. 23, 1993), Pls.' Reply Mem. Ex. 2.) Another Grace memorandum discusses a general "strategy of keeping the reserves out of the hands of our adjacent competitor (desirable)" and of "keeping the reserves off the market." (Letter from R.C. Walsh to D.H. Kohnken (Sept. 17, 1992), Pls.' S.J. Mem. Ex. 20, at G002792-93.) All of these memoranda, the initial draft deeds which included the A.D. Peers property in the 1992 donations, and the fact that the A.D. Peers property was not donated until 1994, all constitute circumstantial evidence that Grace and HGSI did reach a *sub rosa* "understanding" to "assure [VVL] ... not mine" the A.D. Peers property. Therefore, summary judgment on this issue must be denied.

(3) *SUB ROSA* AGREEMENT TO PREVENT MINING ON BRANDY B

VVL asserts that HGSI's lawsuit to enjoin VVL from mining Brandy B was the outcome of a prior *sub rosa* conspiracy between both defendants to prevent mining on Brandy B. The basis of the *Brandy* suit was that Clause 12(E) of the original Brandy A lease between Brandy, Ltd. and Grace, which Grace ultimately assigned to HGSI in 1992, provided the Brandy A lessee with rights to control the use of Brandy B. Clause 12(E) provided, in part, that "no person shall use ... Parcel B without [the lessee's] prior written permission." *The Historic Green Springs, Inc. v. Brandy Farm, Ltd.*, 32 Va. Cir. 98, 99 (1993). The *Brandy* court ultimately found that a modification of the lease divested the lessee of any control over mining on Brandy B.

The defendants claim the plaintiffs have no evidence that Grace and HGSI entered into any prior *sub rosa* agreement to prevent VVL from mining Brandy B. Grace, which was not a party to the *Brandy* litigation, has evidence that it never thought the Brandy A lease provided the lessee with rights to enjoin mining on Brandy B, that Grace was

opposed to the *Brandy* litigation, and that HGSI believed the decision to sue was HGSI's alone.

To satisfy its burden of showing a dispute of material fact, VVL produced **567 evidence that HGSI wrote to Grace requesting that Grace convey the properties adjacent to Brandy B to give HGSI "standing" before the Board of Supervisors to contest the granting of a Brandy B mining permit to VVL. One internal memorandum from Grace's Mr. Walsh, in discussing VVL's plans to obtain permitting for Brandy B, states: "Rae Ely and friends are determined to take on Virginia Vermiculite in what she labels as 'the war of all holy wars' " against VVL. (Letter from R.C. Walsh to D.H. Kohnken (Sept. 17, 1992), Pls.' S.J. Mem. Ex. 20 at G002794.) VVL also argues that the 1992 Brandy A lease assignment, which contained restrictive covenants requiring HGSI to make "reasonable efforts to prevent mining on the premises," when considered in conjunction with Clause 12(E), obligated HGSI to prevent VVL from mining Brandy B. VVL points to a facsimile from HGSI to Grace, wherein HGSI requests that Grace "review and comment" on an HGSI letter attempting to enforce HGSI's ostensible rights under Clause 12(E). VVL also has evidence that a Grace attorney reviewed and edited HGSI's *Brandy* complaint. The plaintiffs allege they are not challenging the litigation itself or HGSI's opposition to the Brandy B permit *per se*, but rather an *ex ante* agreement between the defendants "about how property and contract rights could be exercised to further their conspiracy." (Pls.' Opp'n at 26.) HGSI's opposition to the permit and HGSI's filing of the *Brandy* lawsuit, the plaintiffs claim, are simply the *ex post* consequences of that agreement.

The only justifiable inference that can be drawn in the plaintiffs' favor, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), is that the alleged *sub rosa* agreement was designed only to give HGSI

standing to oppose VVL's permit to mine Brandy B, and to prevent mining thereon through the use of a lawsuit. This argument is foreclosed by the *Noerr-Pennington* doctrine, which immunizes from antitrust liability "anti- competitive conduct undertaken to persuade or petition government entities, or to utilize judicial or quasijudicial mechanisms." *Ottensmeyer v. Chesapeake & Potomac Tel. Co.*, 756 F.2d 986, 992 (4th Cir.1985). *See California Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) (extending the doctrine to "the approach of citizens ... to administrative agencies ... and to courts"); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) ("[T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."). The *Noerr-Pennington* doctrine is based on the First Amendment, protecting the rights to freely associate and petition the government. *See California Motor Trans. Co.*, 404 U.S. at 510-11, 92 S.Ct. 609. Courts have extended the doctrine to reach concerted acts occurring *ex ante* which ultimately result in actual petitioning of the government, *see Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir.1983) ("Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation."); and concerted efforts to petition permitting boards, *see Baltimore Scrap Corp. v. David J. Joseph Co.*, 81 F.Supp.2d 602, 603 (D.Md.2000) (holding that *Noerr-Pennington* immunity extends to anticompetitive, clandestine attempts to contest the granting of zoning permit).

**15 Under this doctrine, seeking to avail oneself of government action only can violate the antitrust laws when the efforts to do so are a "sham." *See Professional Real Estate*

Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993) (holding ***568** that litigation is entitled to immunity from the antitrust laws unless it is "objectively baseless," and that a litigant's subjective motivation is otherwise irrelevant); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 791 F.2d 288, 292 (4th Cir.1986) (elaborating that a sham exists if "the defendant's activity was intended to injure the plaintiff directly rather than through a governmental decision ... where he has no reasonable expectation of obtaining the favorable ruling" (quoting P. Areeda, *Antitrust Law* ¶ 203.1a (Supp.1982).

****16** The plaintiffs do not claim that the "sham" exception to the *Noerr-Pennington* doctrine applies. Although the evidence supports the plaintiffs' position that the defendants entered into the Brandy A lease to block the permitting of Brandy B or to bring a lawsuit to prevent mining on Brandy B, such actions are not illegal under the antitrust laws unless they are undertaken as a sham, without a reasonable expectation of success. The plaintiffs do not allege or produce any evidence that suggests HGSI undertook to influence the permitting board or to bring the *Brandy* litigation without a reasonable expectation of obtaining a favorable ruling, or that HGSI's efforts were objectively baseless. The plaintiffs present no evidence that the alleged *sub rosa* agreement, even if it existed, was anything other than an agreement to persuade the government to prevent mining on Brandy B. That agreement did not itself restrain mining on Brandy B; the restraint would occur only as the consequence of governmental action. *See Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990) (distinguishing between restraints that are the intended *consequence* of government action, which are protected, and restraints that are the *means* by which the defendants seek to obtain favorable government action, which are not protected). In other words, even if the

defendants entered into an agreement "about how property and contract rights could be exercised to further their conspiracy," (Pls.' Opp'n at 26), the plaintiffs provide no evidence that the defendants intended to exercise these rights in any manner other than by petitioning the government. Therefore, the plaintiffs cannot support their evidence of a conspiracy with evidence that the defendants entered into the Brandy A lease to influence the permitting board or to pursue the *Brandy* litigation. Summary judgment on this issue must be granted in the defendants' favor.

(B) EVIDENCE EXCLUDING INDEPENDENT ACTION AND A LEGITIMATE BUSINESS PURPOSE

The plaintiffs also must produce evidence that "excludes the possibility that the [defendants] ... acted independently or based upon a legitimate business purpose." *Laurel Sand & Gravel,* 924 F.2d at 543. In this case, "it is not necessary that HGSI have shared Grace's alleged anticompetitive motive in entering into a proscribed restraint; it is sufficient that HGSI, regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have anticompetitive effects." *Virginia Vermiculite,* 156 F.3d at 541. HGSI argues that there is no evidence it acquiesced in the restraint with knowledge that it would have anticompetitive effects, and that the evidence only shows that HGSI acted with the legitimate purpose of preserving the Landmark. HGSI's argument has little merit. The plaintiffs have come forward with substantial evidence that Grace had motives other than preservation, including: foreclosing the supply of Virginia mining rights; harming the business of VVL, its sole domestic competitor, by preventing it from acquiring further mining rights in Louisa County; and foreclosing the supply of Louisa County vermiculite concentrates. The plaintiffs also produced evidence that HGSI shared these

unlawful motives or at **569 least knew of and acquiesced in them. [11]

The plaintiffs' evidence begins with the restrictive covenants contained in the 1992 donations and lease assignments--entered into between both defendants--which specifically prohibited mining, "including, but not limited to, vermiculite" mining. These restrictions prevented mining even if restoration methods could be used to avoid problems with preservation. On May 26, 1994, HGSI and Grace signed a "Correction Quit Claim Deed of Gift," which changed the restrictive covenants of two properties that originally were part of Grace's 1992 donations. The corrected restrictive covenants precluded only the mining of vermiculite, but no other type of mining. The properties were not located in the historic area HGSI asserts it was attempting to preserve by entering into the covenants. This evidence tends to prove that Grace's motive was to suppress mining in Louisa County, that HGSI knew of and acquiesced in this motive, and that HGSI's motive was not simply to preserve the Landmark.

**17 The plaintiffs proffered further evidence that Grace's donations were made with the unlawful motive of suppressing competition, including a Grace document outlining Grace's options for the disposition of the Louisa County properties. That document contains questions and handwritten responses, and states in part, "How much would our vermiculite business benefit from Virginia [VVL] having to close down due to reserves? $1.5 million. ... What would be the financial impact on our business if they had *our* reserves? $230 [illegible] / yr.[;] $1.5 million disc."

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[11] Although the court of appeals stated that HGSI must have "known" that anticompetitive effects would result, the court reads this statement as requiring that HGSI either have shared Grace's motives, or known of and acquiesced in them with the expectation that the restraints would have an anticompetitive effect.

(Letter from G.E. Poling to R.J. Bettacchi & R.H. Locke (July 27, 1992), Pls.' S.J. Mem. Ex. 10 (emphasis in original).) Another document suggests these figures signify an after-tax benefit of $230,000 per year, and a $1.5 million dollar benefit to Grace, discounted to present value. The plaintiffs also proffered the above- referenced evidence of Grace's "strategy of keeping the reserves out of the hands of an adjacent competitor," evidence describing Grace's continued payment of advanced royalties as "primarily a defensive measure serving to keep Virginia Vermiculite from securing those reserves," and evidence Grace initially held onto its properties while "assessing Virginia Vermiculite's ability to continue to operate." (Pls.' S.J. Mem. Ex. 10.) The plaintiffs also have evidence that Grace analyzed the option of holding the reserves, and concluded the benefit would be to "[k]eep Virginia Vermiculite from gaining needed reserves." (Pls.' S.J. Mem. Ex. 30, at G010427.)

Evidence that HGSI knew of and acquiesced in these motives, other than the express restrictions on mining, is found in statements made by HGSI's president, Rae Ely. Ms. Ely testified in a deposition that, since 1972, she has conducted intensive research into the subject of vermiculite mining, and knows "a fair amount" about vermiculite mining in the United States. She sent a facsimile to Grace describing HGSI's motivation to "ensure the preservation of the area and prevent future mining." (Letter from Rae Ely to Bob Walsh (Sept. 28, 1992), Pls.' Opp'n Ex. 21.) That same facsimile describes Grace and HGSI as having "joint and several goals," as maintaining "the Grace/HGSI cooperative undertaking," and as avoiding inclusion of third parties who might "defeat the original objectives." The plaintiffs also claim that HGSI's only motivation in leasing the Nininger property from Grace was to deprive VVL of vermiculite reserves. The plaintiffs allege that HGSI stopped making payments on its Nininger lease because the *Brandy* decision frustrated the defendants' joint goal of driving VVL out of

business, which was HGSI's only purpose in retaining that property. **570 The plaintiffs provide compelling evidence to this effect. Ms. Ely of HGSI wrote a letter to an attorney for Grace, stating that the effect of the Virginia Supreme Court's denial of HGSI's *Brandy* appeal, "is to open Parcel B AND Parcel A of the [Brandy] tract ... This appears to be enough reserve to keep VVL in business for the duration of the Nininger lease." (Letter from Rae H. Ely to O. Mario Favorito (Aug. 9, 1994), Pls.' S.J. Mem. Ex. 44.) Shortly thereafter, HGSI stopped making payments on its Nininger lease. All of this evidence tends to exclude the possibility that VVL and Grace were acting independently, based on a legitimate business purpose. The defendants dispute the inferences that can be drawn from this evidence, but that is precisely when summary judgment should not be granted.

In its review of the record, the court also has uncovered evidence suggesting--contrary to representations heretofore made by HGSI--that HGSI intends to mine the Louisa County properties. For example, on October 7, 1993, counsel for HGSI wrote a letter to a real estate attorney who served as outside counsel to Grace on a variety of matters, which stated, "In the event my client mines, by separate agreement, my client would agree to transfer all proceeds to W.R. Grace and Company." (Letter from Robert B. Smith, III to Hammill D. Jones (Oct. 7, 1993).) Four days later, that same Grace real estate attorney wrote a letter to Grace's in-house counsel, expressing that, "If Grace has an interest in preventing future mining by Virginia Vermiculite, while affording Green Springs the opportunity for future mining, the above ideas are worthy of consideration." (Letter from Hammill D. "Skip" Jones, Jr. to Kevin T. Grady (Oct. 11, 1993).) On November 12, 1993, the same real estate attorney sent another letter to Grace's in-house counsel, stating, "If the Restated Assignments are effective, Historic Green Springs would acquire the ability to commence mining." (Letter from Hammill D. "Skip" Jones, Jr. to Kevin T. Grady

(Nov. 12, 1993).) From these statements a reasonable jury could conclude that Grace and HGSI conspired to transfer the Louisa County properties to HGSI, which would mine the property and give the proceeds to Grace, while preventing Grace's sole domestic competitor from mining.

**18 All of this evidence tends to exclude the possibility that Grace and HGSI acted independently or based on the purpose of preserving the Landmark, or some other potentially legitimate goal. The plaintiffs having proffered such evidence, it is unnecessary at this stage to determine whether the antitrust laws recognize preservation as a legitimate, procompetitive goal. The plaintiffs produced sufficient evidence to establish the existence of a contract, combination, or conspiracy to restrain trade in violation of § 1 of the Sherman Act. Accordingly, the defendants' motions for summary judgment on this issue shall be denied, except as otherwise stated *supra* with regard to *Noerr-Pennington* issues.

2. EVIDENCE OF AN UNREASONABLE RESTRAINT OF TRADE

To sustain their § 1 claims, the plaintiffs also must have sufficient evidence to establish that the alleged contract, combination, or conspiracy unreasonably restrained trade. *See* 15 U.S.C.A. § 1 (West 1997 & Supp.2000). To assess the reasonableness of a restraint, courts have taken one of three approaches. First is the "illegal *per se* " rule. This rule classifies as illegal *per se* "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

Second is the traditional "rule of reason" approach. *See Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918) (holding that "the court must ordinarily consider ***571** the facts peculiar to the business to which the restraint is applied"). Under the rule of reason, elaborate inquiry into the actual conditions of the market is required, because the fact-finder must "weigh[ ] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). For example, the plaintiff must come forward with evidence of a relevant product and geographic market within which the restraint produces anticompetitive effects, as well as proof of actual anticompetitive effects. *See Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Va., Inc.*, 714 F.2d 351, 355 (4th Cir.1983) (noting that "[t]he plaintiff in an antitrust case bears the burden of proof on the issue of the relevant product and geographic markets"). The requirements under the rule of reason are discussed in greater detail below.

The third approach, the "abbreviated rule of reason," or "quick look" approach, is used when a restraint is not illegal *per se*, but nevertheless has such obvious anticompetitive effects that a full-scale rule of reason analysis is not necessary. *See California Dental Assoc. v. Federal Trade Comm'n*, 526 U.S. 756, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999). In such a case, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 109, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) (quoting *National Soc'y of Prof'l Eng'rs. v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978)); *see also Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir.1998) ("Under a quick look rule of reason analysis, anticompetitive effect is established, even

without a determination of the relevant market...."). Since evidence of a relevant market is required under the full-scale rule of reason approach, but not under the quick look approach, determining which analysis to use in this case perhaps is the most significant question before the court. [12]

**19 Neither party asserts that the *per se* rules apply in this case. The plaintiffs assert that the "quick look" analysis applies, and move for partial summary judgment (on both their federal and state antitrust claims) that the defendants' conduct unreasonably restrained trade under that approach. The defendants argue that the "quick look" analysis is inappropriate in this case, and move for summary judgment that the plaintiff cannot carry its burden under the full-scale rule of reason approach.

(A) ABBREVIATED RULE OF REASON

In certain situations in which the anticompetitive nature of a restraint is apparent without elaborate market analysis, courts sometimes decide not to undertake a full-scale rule of reason analysis, and instead apply an abbreviated rule of reason approach. If the restraint has obvious anticompetitive effects, the court may proceed directly to weighing the procompetitive and anticompetitive effects, "even in the absence of a detailed market analysis," *National Collegiate Athletic Ass'n*, 468 U.S. at 110, 104 S.Ct. 2948, and ultimately condemn a restraint that has a net anticompetitive effect. Cases applying the quick look approach have involved, for example, restrictions on both price and output which resulted in the "[p]rice [being] higher and output lower than they would otherwise be,"

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[12] As discussed more fully below, defining a relevant market poses a great problem for the plaintiffs in light of this court's May 4, 2000 opinion, which excluded the report and testimony of the plaintiffs' only proposed expert on antitrust economics. *See Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 98 F.Supp.2d 729 (W.D.Va.2000).

National Collegiate Athletic Ass'n, 468 U.S. at 107, 104 S.Ct. 2948; "an absolute ban on competitive bidding," *National* *572 *Soc'y of Prof'l Eng'rs.*, 435 U.S. at 692, 98 S.Ct. 1355; and "a horizontal agreement among the [defendants] ... to withhold from their customers a particular service that they desire," *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986).

The United States Supreme Court recently clarified when it is appropriate for a court to conduct a "quick look" analysis in lieu of a full-scale rule of reason analysis. *See California Dental Ass'n v. Federal Trade Comm'n*, 526 U.S. 756, 764-65, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999) (granting certiorari "to resolve conflicts among the Circuits on ... the occasions for abbreviated rule-of-reason analysis"). In *California Dental*, the Federal Trade Commission ("FTC") brought a complaint against a nonprofit association of local dental societies, the California Dental Association ("CDA"), for violation of § 5 of the FTC Act, *see* 15 U.S.C.A. § 45 (West 1997 & Supp.2000), which "overlaps the scope of § 1 of the Sherman Act." *California Dental*, 526 U.S. at 762 n. 3, 119 S.Ct. 1604. The dentist members of the CDA were required to abide by a Code of Ethics, which restricted the type of advertising in which the dentists may engage, to advertising that was not "false or misleading in any material respect." *Id.* at 760, 119 S.Ct. 1604. When a dentist engaged in "discount advertising," she or he had to make certain disclosures, such as the dollar amount of the discount, the length of time a discount would be offered, and the identity of specific groups that qualified for the discount. *See id.* at 761 n. 2, 119 S.Ct. 1604. Applicants could be denied membership in, or expelled from, the CDA for violating these provisions. The FTC alleged that these provisions unreasonably restricted truthful, nondeceptive price advertising (particularly the advertising of "across-the-board discounts," *id.* at 774, 119 S.Ct. 1604) and nonprice (quality) advertising.

**20 On review of the final decision of the FTC, which adopted the findings of an Administrative Law Judge, the Ninth Circuit Court of Appeals found--under a quick look analysis--that these restrictions adversely affected both dentists and consumers of dental services in violation of the FTC Act § 5. The Ninth Circuit held that the price restrictions constituted a "naked" restraint on price competition, and that the proffered procompetitive justification "carried little weight because 'it is simply infeasible to disclose all of the information that is required.' " *Id.* at 764, 119 S.Ct. 1604 (quoting *California Dental Ass'n v. Federal Trade Comm'n*, 128 F.3d 720, 728 (9th Cir.1997)). The Ninth Circuit also held that the nonprice restrictions were sufficiently anticompetitive to justify a quick look analysis, simply because they "are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services." *Id.* (quoting *California Dental*, 128 F.3d at 728).

The Supreme Court vacated the judgment, finding it error to proceed to a quick look analysis without first "scrutiniz[ing] the assumption of relative anticompetitive tendencies."*Id.* at 781. The Court began by noting that, in its previous quick look cases, the anticompetitive effects were so obvious that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id.* at 770.

The Court then examined the restraints in question, finding it was not comparably obvious that they would have anticompetitive effects. As to the price restrictions, the court of appeals's finding was insufficient because it "brush[ed] over the professional context and describe[d] no anticompetitive effects." *Id.* at 774. The Court added that it was not obvious *a priori* that the restraints would have any effect at all on competition, noting that whether an across-

the-board discount would be more or less effective at conveying information *573 than a discount that specified the information required by the disclosures was an empirical question. Nor was it obvious that the restraints would not have a positive effect on competition. "As a matter of economics this view may or may not be correct, but it is not implausible." *Id.* at 775. In sum, the threshold question of whether the restraints would have anticompetitive effects was not obvious *a priori.* Since the court of appeals simply presumed that the price restraints would have anticompetitive effects, the Supreme Court held it was error to take the next step, and "shift a burden to the CDA to adduce hard evidence of the procompetitive nature of its policy." *Id.* at 776. The court of appeals similarly erred when it found, with regard to the nonprice restrictions, that a mere restriction of supply constituted a "naked" restraint. The Supreme Court "question[ed] the logic of the Court of Appeals's suggestion that the restrictions are anticompetitive because they somehow 'affect output,' ... absent further analysis ... it is not possible to conclude that the net effect of this particular restriction is anticompetitive." *Id.* at 777 n. 13.

**6 The plaintiffs argue that a quick look analysis is appropriate in this case because "[a] restraint on market choice that is unclothed by plausible procompetitive justification is naked and thus illegal under the Rule of Reason without further market inquiry." (Pls.' S.J. Mem. at 26.) The plaintiffs then assert that donating 70-95% of mining rights in Louisa County (depending on what properties are included in the calculation) is a *prima facie* anticompetitive suppression of supply. In support of this proposition, the plaintiffs offer nothing more than the statement that "[i]t plainly had only one effect on the market for vermiculite mining and production: suppressing output and making it more difficult for VVL to compete with Grace." (Pls.' S.J. Mem. at 29.) The plaintiffs read *California*

*Dental*as "remain[ing] committed to the doctrine that quick look review is warranted where defendants have not offered any logical procompetitive justification," and assert that "where the restraint on its face restricts output if it has any effect at all, there is no reason to subject antitrust plaintiffs and the courts to the costs of specifying the extent of that effect." (Pls.' Reply Mem. at 20.) The bulk of the plaintiffs' analysis concerns the illegitimacy of the defendants' possible procompetitive justifications.[13] In essence, the plaintiffs argue that this court should apply a quick look analysis to find the defendants' actions in violation of Sherman Act § 1 and the corresponding state antitrust law, because restriction of supply is anticompetitive on its face and the defendants did not satisfy their burden of coming forward with a procompetitive justification for their actions.

To follow the plaintiffs' suggestion would violate the principles of *California Dental*in two respects. First, as the Supreme Court made clear, the court cannot simply assume, without further analysis, that a restriction on output is *prima facie* anticompetitive. Second, the type of burden-shifting advocated by the plaintiffs is exactly what the Supreme Court disapproved of in *California Dental.* In the dissenting portion of his opinion, Justice Breyer stated that "[t]he basic question is whether this ... theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects in this case." *Id.* at 791, 119 S.Ct. 1604 (Breyer, J., concurring in part and dissenting in part). The Court described this as "implicit burden shifting," *id.* at 775 n. 12, 119 S.Ct. 1604, and then clarified who bears what burdens in a "quick look" case:

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[13] The plaintiffs also cite much of the evidence tending to indicate that the defendants had anticompetitive motives. The present inquiry, however, is concerned with the effects of the restraint, not the motives behind them.

> **22 [B]efore a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical **574 evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.

Id. The Court found that because the Ninth Circuit conducted too "lenien [t][an] ... enquiry into evidence of the restrictions' anticompetitive effects," *id.* at 776, 119 S.Ct. 1604, it was error "to shift a burden to the CDA to adduce hard evidence of the procompetitive nature of its policy." *Id.* "The point is not that the CDA's restrictions necessarily have the procompetitive effect claimed by the CDA; it is possible that banning quality claims might have no effect at all on competitiveness...." *Id.* at 778, 119 S.Ct. 1604. Rather, the point was that "[t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown." *Id.*The Supreme Court vacated the judgment "[b]ecause the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies." *Id.* at 781, 119 S.Ct. 1604.

The threshold inquiry, therefore, is whether an obvious anticompetitive effect is discernable *a priori*, such that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id.* at 770, 119 S.Ct. 1604. If this threshold showing is not made, then the abbreviated analysis is not "trigger[ed]," *id.* at 778, 119 S.Ct. 1604, and the court need

not analyze the offsetting procompetitive justifications, weigh them against the anticompetitive effects, and determine a net result. Absent a threshold showing of obvious anticompetitive effects, a quick look analysis is inappropriate and the claim must be examined under a full-scale rule of reason analysis. Only if the anticompetitive effects are obvious does the burden shift to the defendants to proffer empirical evidence that their acts have a legitimate procompetitive justification.

The court acknowledges that donation of at least 70% of the mining rights in Louisa County, at first glance, appears to be a naked restraint of trade requiring some procompetitive justification. However, the court cannot stop at a first glance. *California Dental,* 526 U.S. at 775 n. 12, 119 S.Ct. 1604. A second glance reveals the undisputed evidence that the price of mining rights in Louisa County has not risen at all since 1992. One possible explanation is that Louisa County is too narrow a geographic market for a restriction of supply to affect the price of mining rights. As in *California Dental,* this inquiry is subject to empirical, but not *a priori,* analysis. Given this evidence alone, it is not obvious that the restraints had an anticompetitive effect in an alleged Louisa County mining rights market. Further, whether such a market exists independent of the downstream market for vermiculite is highly suspect. *See, e.g., Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.,* 98 F.Supp.2d 729, 738 (W.D.Va.2000) ("[M]ining rights obtain their value from the downstream product of vermiculite concentrates."). The plaintiffs' evidence of a relevant market is discussed in greater detail below.

**23 Nor is it obvious that the donations caused injury to VVL, let alone a substantial adverse effect on competition "as a whole." *See Advanced Health-Care Serv., Inc. v. Giles Mem'l Hosp.,* 846 F.Supp. 488, 493 (W.D.Va.1994). VVL never had any contractual or property rights to the land at issue; it is not obvious "whether Grace would have

allowed mining in the absence of both the donation and the nonmining agreements," *Virginia Vermiculite v. W.R. Grace & Co.-Conn,* 156 F.3d 535, 539 (4th Cir.1998) (emphasis omitted), or whether Grace was "*required* to grant VVL access to its Virginia holdings, on the ground that failure to do so would constitute ***575** an improper unilateral refusal to deal." *Id.*(emphasis in original). While the court does address these questions below, it is unwilling to assume the answers under an abbreviated analysis. VVL also acknowledges that it currently has enough reserves to last until 2012--over a decade from now. Though a substantial portion of the merchantable Virginian vermiculite reserves is foreclosed by the donations, it still may be possible for VVL to find and obtain other reserves in Louisa County---specifically the Nininger property[14]--during the next decade.

Finally, even if the plaintiffs' claims are construed to be based on a "leveraging theory," which alleges the defendants unlawfully used their power in one market (*i.e.* the mining rights market) to gain a competitive advantage in another (*i.e.* the concentrates market), it is not obvious that the restraints had any anticompetitive effect in the downstream concentrates market. The price of small and ultra-small concentrates has not increased since 1991, and while the price of mid-size concentrates increased substantially, the cause of the increase is not discernable *a priori.* There is evidence in the record that demand for mid-size concentrates and Grace's costs both increased during the period of the price increase, either or both of which plausibly could account for the increase in price. Grace also has evidence that it lost sales of mid-size concentrate to the customers who suffered the price increase.

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14 VVL disputes that the property is "available," because it alleges the Niningers have been unwilling to deal with VVL. For the purposes of the present inquiry, the uncertainty of whether the Niningers will make their reserves available to VVL reinforces the court's determination that it is not *obvious* that the restraint has had, or will have, any anticompetitive effect in the market.

The foregoing does not purport to determine whether or not the restraints actually had a net anticompetitive effect. The parties dispute whether the restraints have anticompetitive effects, and whether procompetitive reasons justify the restraints. As in *California Dental,* the point is not that the restrictions necessarily have an anticompetitive effect, a procompetitive effect, or no effect at all on competition. The point is, the restrictions do not have an anticompetitive effect so manifest as to merit only a "quick look."

(B) FULL-SCALE RULE OF REASON ANALYSIS

****24** Under the traditional rule of reason analysis, the plaintiffs must produce sufficient evidence to prove that the contract, combination, or conspiracy unreasonably restrained trade in a relevant market. The plaintiffs bear the initial burden of providing sufficient evidence to establish the relevant product and geographic markets. *See Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Va., Inc.,* 714 F.2d 351, 355 (4th Cir.1983). The plaintiffs then must have sufficient evidence to show actual anticompetitive effects within those markets. *See Oksanen v. Page Mem'l Hosp.,* 945 F.2d 696, 709 (4th Cir.1991). If the plaintiffs satisfy their burdens, the burden shifts to the defendant to provide evidence that the restraints are justified by procompetitive virtues. *See Chuck's Feed & Seed Co. v. Ralston Purina Co.,* 810 F.2d 1289, 1294 (4th Cir.1987) (considering pro-competitive justifications in rule of reason analysis); *see also K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.,* 61 F.3d 123, 127 (2d Cir.1995) (discussing the parties' respective burdens).

The plaintiffs' initial burden is to produce sufficient evidence to establish that the defendants restrained trade in a "relevant market." [15] *See Satellite Television,* 714 F.2d at 355. Defining the relevant market is a "necessary predicate" of a finding that the antitrust laws were violated. *576 *U.S. v. E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 593, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957); *Satellite Television,* 714 F.2d at 355 (noting that market definition is necessary because "the concept of competition has no meaning outside its own arena"). The relevant market includes both a product market and a geographic market. *See Satellite Television,* 714 F.2d at 355 (4th Cir.1983). "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross- elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States,* 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *see also Stearns v. Genrad, Inc.,* 752 F.2d 942, 946 (4th Cir.1984) ("If there is cross elasticity of demand or interchangeability of products ... one must deal with a much larger market than if there is none."). Cross-elasticity of demand is "[t]he extent to which customers will change their consumption of one product in response to a price change in another." *Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 469, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992). A properly-defined product market thus must take account of which products, if any, compete with the defendant's product, and must include reasonably interchangeable substitute products that limit the defendant's ability to sustain an increase in price above competitive levels. *See Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.,* 889 F.2d 524, 528 (4th Cir.1989). The geographic market is "the area in which buyers or sellers of the relevant product effectively compete.... [T]he geographic market should consist of an area in which the defendants operate

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[15] For their § 2 claims, the plaintiffs must define a market they allege the defendants monopolized, attempted to monopolize, or conspired to monopolize. *See* Part II.B *infra.*

and which the plaintiff can reasonably turn to for supplies." *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 495 (4th Cir.1986) (emphasis, citations, and internal quotation marks omitted). In sum, a relevant market is "the narrowest which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market." *Satellite Television*, 714 F.2d at 356 (quoting L. Sullivan, *Handbook of the Law of Antitrust* § 12, at 41 (1977)).

The plaintiffs assert that the relevant market for their § 1 claims is the market for vermiculite mining rights (product market) in Louisa County, Virginia (geographic market). They maintain that the defendants unreasonably restrained trade in Virginian vermiculite mining in order to monopolize the downstream market of vermiculite concentrates. The defendants move for summary judgment on the grounds that the plaintiffs failed to come forward with evidence sufficient to establish the existence of such a market, and that the undisputed facts show that such a market is legally and economically unsustainable. The defendants assert that the proper market for the plaintiffs' claims is the world-wide market for vermiculite concentrates and their reasonably interchangeable substitutes.

**25 Market definition typically is a question of fact for the jury. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n. 20, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985); *International Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 245, 251, 79 S.Ct. 245, 3 L.Ed.2d 270 (1959); *International Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 430 (4th Cir.1986). Therefore, the court must determine whether the plaintiffs' remaining evidence--after the exclusion of the report and testimony of the plaintiffs' only antitrust economics expert, Mr. Schwartz--is sufficient to establish their definition of the relevant § 1 market. *See*

Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).[16]

**577 The plaintiffs claim that the relevant § 1 product market is vermiculite mining rights. In other words, the buying and selling of the intangible rights to mine vermiculite constitute a distinct market, independent of any downstream market for vermiculite concentrates or expanded vermiculite. Acknowledging that it is the only purchaser of mining rights in Louisa County, VVL asserts that if Grace were to increase the price of those rights by 5%,[17] VVL would have to continue purchasing mining rights from Grace because VVL could not

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16 At oral argument, Grace asserted that a party must present testimony by an antitrust economics expert as a matter of law, and that the court's exclusion of the report and testimony of Mr. Schwartz mandates dismissal of the antitrust claims that depend on market definition. Although an expert generally is used to establish the relevant market, *see Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 98 F.Supp.2d 729, 736 (W.D.Va.2000), there is no *per se* rule that an antitrust economics expert is required in all antitrust cases. However, as a practical matter and as discussed below, the plaintiffs' lack of any witness to testify about antitrust economics, or to rebut the defendants' economists, proves fatal. *See generally Victus, Ltd. v. Collezione Europa U.S.A., Inc.*, 26 F.Supp.2d 772, 787 (M.D.N.C.1998) ("Economic experts may not be required, but Europa has not provided affidavits of any witnesses who can address such questions.... No reasonable jury could find that a relevant market, as described by Europa, exists.").

17 In its Horizontal Merger Guidelines, the United States Department of Justice uses a price increase of 5% lasting for the foreseeable future "[i]n attempting to determine objectively the effect of a 'small but significant and nontransitory' increase in price." *See* Antitrust Division, U.S. Dep't of Justice, 1992 Horizontal Merger Guidelines, 57 Fed.Reg. 41552, at § 1.11 (hereinafter the "Guidelines"). *But see id.* ("However, what constitutes a 'small but significant and nontransitory' increase in price will depend on the nature of the industry."). The plaintiffs and their now-excluded expert rely heavily on the Guidelines in attempting to propose a properly-defined relevant market. This reliance is misplaced in many respects (as detailed below), not the least of which is that, although this case does not involve a merger, "[t]he 'small but significant and nontransitory increase in price' is employed solely as a methodological tool for the analysis of mergers: it is not a tolerance level for price increases." *Id.* at § 1.0.

turn to another product to produce, due to the expense of converting its vermiculite processing facility. Grace thus would be able to sustain a 5% increase in the price of mining rights. In support of this definition, the plaintiffs offer only the evidence of their nowexcluded expert, Mr. Schwartz, and an affidavit by VVL's plant manager, Mr. Ned Gumble, stating that a vermiculite processing plant only can process vermiculite, and no other type of ore.

The defendants discharge their summary judgment burden both by pointing out that there is an absence of evidence to support the plaintiffs' proposed product market definition, and by providing their own unrebutted evidence that negates the plaintiffs' proposed definition. *See Celotex*, 477 U.S. at 331, 106 S.Ct. 2548 (Brennan, J., dissenting). First, the plaintiffs' only evidence of a mining rights product market besides the now-excluded testimony of Mr. Schwartz is the affidavit from Mr. Gumble. The plaintiffs argued at the hearing that the exclusion of Mr. Schwartz is not fatal because the jury could apply the underlying facts to the Guidelines. However, the Guidelines themselves state: "Because the specific standards set forth in the Guidelines must be applied to a broad range of possible factual circumstances, mechanical application of those standards may provide misleading answers to the economic questions raised under antitrust laws." Guidelines § 0. The court will not permit the jury to apply mechanically a testing method which, under its own statement of purpose, discourages mechanical application. Even armed with the Guidelines, no reasonable jury could define a relevant product market based solely on one affidavit stating that a vermiculite processing plant only can process vermiculite ore. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (holding that summary judgment may not be defeated by evidence that is "merely colorable" or "not significantly probative").

Second, under the undisputed material facts in this case, the upstream market has **578 no significance

independent of the downstream vermiculite market (expanded and non-expanded). The defendants proffered testimony from expert economists that the downstream market must be considered in the definition of the mining rights product market. (*See, e.g.*, Mills Aff. at 3 ("Whether vermiculite mining rights can be a relevant [product] market depends on whether there are substitutes to which the users of vermiculite might turn.").) None of the parties are solely in the business of buying and selling mining rights; the only reason VVL and Grace buy vermiculite mining rights is to mine and sell vermiculite. The defense experts testified that rights to mine vermiculite derive their value from the downstream vermiculite product, and that the downstream product competes with other downstream minerals such as polystyrene and perlite.[18] They conclude that a proper definition of the market for mining rights must consider whether these downstream products have a significant or negligible cross-elasticity of demand. (*See, e.g.*, Mills Aff. at 3 ("To determine whether sources of competing materials belong in the same antitrust market with vermiculite mining rights ... requires an investigation of whether these materials restrain the prices of vermiculite mining rights").) Although counsel for the plaintiffs assailed these economic conclusions at oral argument, the plaintiffs have no qualified antitrust economics witness to rebut this evidence. For example, counsel for the plaintiffs correctly states that cross-elasticity of demand helps establish whether two products are close substitutes only when both are sold at competitive prices. *See* Donald F. Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L.Rev. 281, 308-10 (1956). Without an antitrust

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[18] The plaintiffs argue that perlite is not a substitute for vermiculite because the prices of perlite and vermiculite move in opposite directions. Without a witness to testify about the economic significance of opposite price movement, this raw evidence cannot rebut the defendants' evidence of substitutability. The parties' respective evidence concerning the reasonable interchangeability of downstream substitutes with vermiculite is discussed in further detail below, with regard to the plaintiffs' § 2 claims. *See* Part II.B.1 *infra*.

economics expert to analyze whether the prices were competitive, or to evaluate the significance of any cross-elasticity analysis, the plaintiffs cannot rebut the defense experts' testimony.

**26 The defendants also have unrebutted evidence that downstream competition for vermiculite in fact constrains the price of upstream vermiculite mining rights. Lewis Hash, VVL's first president, informed the Peers--sellers of mining rights--that perlite constrains the value of vermiculite mining rights; there also is evidence that Grace representatives informed the Purcells that the competitive position of vermiculite with other downstream minerals limited the royalty rate Grace would pay for vermiculite mining rights. The plaintiffs have no evidence that potential substitutes for the downstream concentrates do not affect the value of mining rights.[19]

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[19] HGSI also argues the plaintiffs' proposed definition fails because it has not accounted for substitute uses of the land. HGSI's expert, Professor David Mills, testified that preservation competes with mining as an alternative use of the land. The argument essentially is that the proper market should be the broader "land use" market. Professor Mills claims that VVL and HGSI are "land use" competitors, and that a hypothetical monopolist could not raise the price of mining rights above competitive levels without the buyers of land switching to an alternate use of the land, such as preservation. Professor Mills bases his conclusion on the following two statements: "Vermiculite mining competes with a host of other land uses (agricultural, residential, etc.) for rights to use, transform, preserve, or develop land. Vermiculite mining rights are indispensable for some non-mining land uses for the simple reason that those uses are mutually exclusive with vermiculite mining." (Mills Aff. at 4.) (*See also* Mills Report at 3 (making the same statements).) These statements are not specific facts, do not set forth the specific facts on which they are based, and do not appear to be based on any specific data that would suggest vermiculite mining competes with other land uses or is indispensable for non-mining land uses; they are nothing more than "conclusory statement[s] based on general antitrust theory." *M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 164 (4th Cir.1992) (en banc) (as amended). As such, the "alternate land use" claim by Professor Mills does not satisfy the requirements of Federal Rule of Civil Procedure 56(e). *See id.* at 166.

**579 In the face of unrebutted evidence of reasonably interchangeable downstream substitutes that constrain the price of upstream mining rights, it is the plaintiffs' burden to conduct at least a rudimentary cross-elasticity analysis that would tend to show these substitutes should be excluded from the product market. *See Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Va., Inc.*, 714 F.2d 351, 356 (4th Cir.1983) ("[The plaintiff] fails to realize that it is exactly this failure to provide as evidence anything more than generalizations about the interchangeability and competition among the [products] ... that is fatal to its submarket theory."); *see also Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir.1997) ("Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross- elasticity of demand ... the relevant market is legally insufficient...."). The plaintiffs did not conduct any analysis to determine whether downstream substitutes should be excluded from the mining rights market, and have no evidence that mining rights do not derive their value from the downstream concentrates. The plaintiffs cannot rest on the affidavit of Mr. Gumble and argument from counsel to prove that the substitutes proffered by the defendants should not be included in the market. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The plaintiffs claim that *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986), holds that evidence of a downstream market is unnecessary to prove a restraint of the upstream market. That case involved an agreement between dentists not to submit x-rays to dental insurers for use in the insurers' determinations of benefits, which resulted in insurers' either having to use more expensive means of determining benefits, or to abandon their efforts altogether. The plaintiffs argue that anticompetitive effects were shown

even without proof that the insurers' failure to obtain x-rays actually "made [downstream] dental services ... more costly." *Id.* at 461, 106 S.Ct. 2009. The Court analyzed the complained-of restraint under an abbreviated rule of reason analysis, and specifically found "actual, sustained adverse effects on competition ... even in the absence of elaborate market analysis." *Id.* at 461, 106 S.Ct. 2009. As the court found an abbreviated rule of reason analysis to be inappropriate in this case under *California Dental Association v. Federal Trade Commission*, 526 U.S. 756, 764-65, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999), *Indiana Federation of Dentists* is inapposite.

The plaintiffs' omission of the downstream market undermines their proposed definition on another ground. The plaintiffs' contention that the defendants restrained trade in the mining rights market in order to monopolize the downstream concentrates market amounts to a "leveraging" claim. *See* Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum. L.Rev. 515 (1985) ("Traditional leverage theory claims that a monopolist's use of its power in its own market to control activities in another market typically represents an attempt to spread its power to the other market."). Several courts have held that a leveraging claim requires proof of at least three elements: "monopoly power in one market, the use of that power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor in another distinct market ... and injury caused by the challenged conduct." *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 681 (2d Cir.1985) (quoting *Berkey Photo, Inc. v. *580 Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir.1979) (quoting *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984))) (internal quotation marks omitted). *See also Kerasotes v. National Amusements, Inc.*, 854

F.2d 135, 137 (6th Cir.1988) (defining leveraging as "the use of monopoly power in one market to amplify or 'leverage,' a position in another competitive market" (quoting *White & White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495, 506 (6th Cir.1983))).[20] Therefore, a leveraging claim necessarily requires definition of two markets: the market that provides the leverage, and the "leveraged" market the defendants seek to restrain trade in or monopolize. *See Directory Sales Management Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir.1987) (dismissing claim that Ohio Bell leveraged its position in the upstream telephone market to restrain competition in the downstream yellow pages market where "the agreements with [upstream] customers appear to have no connection to the [downstream] yellow pages market"); *Advanced Health-Care Servs., Inc. v. Giles Mem'l Hosp.*, 846 F.Supp. 488, 496-97 (W.D.Va.1994) (noting that even if monopoly leveraging exists as an independent antitrust claim, it would fail because plaintiff failed to prove that defendant "gained an unfair competitive advantage in the [downstream] DME market"). The plaintiffs limited their § 1 claims to the upstream mining rights market, and their § 2 claims to the downstream concentrates market. The plaintiffs asserted no claim that incorporates both markets, and thereby rendered themselves incapable of showing any relationship between the two markets for any particular claim. Therefore, to the extent the plaintiffs asserted a "monopoly leveraging" claim, their decision to limit their § 1 claim to a single market renders such a claim legally unsustainable.

The plaintiffs assert that the relevant § 1 geographic market is Louisa County, Virginia. They argue that if Grace

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[20] The Fourth Circuit recognized these elements of monopoly leveraging in*M & M Medical Supplies and Service, Inc. v. Pleasant Valley Hospital, Inc.*, 981 F.2d 160, 168-69 (4th Cir.1992) (as amended) (en banc), but reserved judgment on whether monopoly leveraging is cognizable as an independent claim under the antitrust laws. *See id.* at 169.

were to increase the price of mining rights in Louisa County by 5%, VVL would have to continue purchasing those rights from Grace because transportation costs would prohibit VVL from turning to another geographic region, such as South Carolina. VVL claims it is "locked in" to the Virginian mining rights market because sustaining a monopolistic price increase would be less costly than the alternative: mining in South Carolina, and either building a new processing mill there or processing South Carolinian ore in Virginia. In support of this definition, the plaintiffs offer the evidence of their now-excluded expert, Mr. Schwartz; the affidavit from Mr. Gumble stating that a vermiculite mill must be located within a certain distance of the mining site in order for the transportation costs to be low enough to keep the mill profitable; and evidence that costs of switching to another region--*i.e.* transporting vermiculite from another region, or building a new processing mill elsewhere--are prohibitively expensive. Therefore, the only remaining evidence to support the plaintiffs' proposed geographic market definition, after the exclusion of Mr. Schwartz's testimony, concerns transportation, or "switching," costs.

**28 In attempting to satisfy their summary judgment burden, the defendants first maintain that the plaintiffs do not have sufficient evidence to support a definition that limits the geographic market to Louisa County. Specifically, the defendants claim that without the expert testimony of a qualified antitrust expert, the jury would have no means of drawing the necessary inferences from the remaining evidence to **581 define the market that the plaintiffs propose.

Since the exclusion of Mr. Schwartz, the plaintiffs rely primarily on*M & M Medical Supplies and Service, Inc. v. Pleasant Valley Hospital, Inc.*, 981 F.2d 160 (4th Cir.1992) (as amended) (en banc), to assert that they have met their

burden of producing sufficient evidence to define a geographic market. The plaintiff in *M & M* sold durable medical equipment ("DME"), such as wheelchairs and walkers, in the Mason County, West Virginia area. When the only hospital in the county founded its own DME business to increase profits, the plaintiff's revenues fell by more than 75%. The plaintiff alleged monopolization and attempted monopolization under the Sherman Act § 2, and proposed to define the relevant geographic market as Mason County. The plaintiff supported this definition with the affidavit of a qualified antitrust economics expert who testified that the patient origin data "strongly suggest that Mason County residents rely predominantly upon Mason County suppliers for their hospital and medical equipment needs." *Id.* at 164 (quoting the expert report). The district court disregarded this affidavit because it found the affidavit to be a conclusory statement that did not set forth specific facts. The Fourth Circuit held that the expert's affidavit should not have been disregarded because it stated the facts on which it was based, and did not need to set forth the data supporting those facts. *See id.* at 166.

At oral argument, counsel for the plaintiffs stated that, in *M & M*, "the geographic market was sufficiently proven by one piece of evidence and that evidence was that county residents predominantly relied on local suppliers." (May 9, 2000, Tr. at 89-90.) The plaintiffs claim that because they have evidence that consumers of Louisa County vermiculite mining rights (*i.e.* VVL) rely not only primarily, but exclusively, on local supply of those mining rights to process Louisa County vermiculite (due to transportation costs), they satisfy their burden of producing evidence sufficient to prove a geographic market limited to Louisa County. In *M & M*, however, it was not the bare facts supporting the affidavit that were sufficient to establish the relevant market; it was the affidavit itself, of an expert whose qualifications "[were] not questioned," which

sustained the plaintiff's burden. *Id.* at 164. Unlike in *M & M*, the plaintiffs in the case at bar do not support their definition of such a narrow geographic market with the affidavit of a qualified expert on antitrust economics. The plaintiffs have no witness to testify about why it follows as a matter of economics that a mining company's exclusive consumption of and reliance on Louisa County reserves establishes the relevant geographic market as Louisa County. In other words, no reasonable jury presented solely with the plaintiffs' remaining raw data could draw the economic inferences necessary to define Louisa County as the relevant geographic market.

****29** The defendants alternatively discharge their summary judgment burden by producing unrebutted evidence that the plaintiffs' proposed geographic market definition suffers from fundamental flaws, and as a matter of economics is too narrowly drawn. *See Consul Ltd. v. Transco Energy Co.*, 805 F.2d 490, 495 (4th Cir.1986) (cautioning that "[a] market drawn too tightly ... in geographic terms that exclude potential suppliers ... creates the illusion of market power where none may exist"). VVL bases its geographic definition on the premise that, being the only buyer of vermiculite mining rights in Louisa County, the only relevant questions are: where are the reserves that supply the ore to VVL's Virginia mill located; and what response would VVL have to a supracompetitive increase in the price of the right to mine those reserves.

The defendants provide an expert affidavit and report from Professor Mills, stating that a proper geographic market cannot be based solely on the scope of a ****582** single buyer's activity (*e.g.*, VVL's mining activities in Louisa County, Virginia). In other words, a proper geographic definition cannot consider VVL's Louisa County transportation costs alone. The plaintiffs having no witness who could rebut this testimony, the jury only would have

Dr. Mills's testimony to rely on in determining the proper economic procedure for defining a geographic market. Therefore, the jury would have no reasonable basis for defining the proposed geographic market in the manner the plaintiffs propose.

Professor Mills states that a proper definition of a geographic market must consider the location of other potential buyers of Louisa County vermiculite, and the location of suppliers to those buyers. He concludes that because mining companies such as VVL and Grace (potential buyers of Louisa County vermiculite) consider reserves available anywhere to them in determining where to establish a plant, and because the geographic market for vermiculite concentrate is at least North America, the potential supply to those mining companies includes reserves not only from Louisa County, but also, at a minimum, reserves from South Carolina and Montana.[21] Therefore, Professor Mills concludes, a proper geographic definition must take these locations into account. *See Consul,* 805 F.2d at 495 (holding that the geographic market must "encompass the area of effective competition between the parties"). The plaintiffs have no witness who could rebut this economic methodology or these conclusions.

**30 Citing their remaining evidence that the cost of building a new mill would prevent VVL from closing its Louisa County mill and opening a new mill elsewhere, the plaintiffs argue that they were "locked in" to the Louisa County mining rights market, and that such evidence is

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21 Undisputed record evidence confirms that there continue to be substantial vermiculite reserves available outside of Virginia. The plaintiffs acknowledge that even today there are unleased properties in South Carolina containing at least 2,000,000 tons of vermiculite concentrates--enough to last VVL's South Carolina division another fifty-seven years. It also appears that Montana now possesses commercially viable vermiculite reserves. A new domestic competitor recently shipped its first load of vermiculite from its mine and mill in Montana.

sufficient to sustain their burden. The plaintiffs contend that the Supreme Court recognized lock-in effects as creating a genuine dispute of material fact about the definition of a relevant market in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992).

In *Eastman Kodak,* Kodak sold photocopier machines and provided services and parts for those machines to its customers. The Kodak photocopiers only could use Kodak parts, which made the photocopiers "unique" products. *See id.* at 456-57, 112 S.Ct. 2072. The plaintiffs, independent service organizations ("ISOs"), also serviced the Kodak machines, but at a lower price than Kodak. When customers began to purchase their own parts, and hire the ISOs only for service, or for service and parts, Kodak implemented a change of policy whereby it only sold replacement parts to customers who used Kodak service. This made it more difficult for ISOs to service Kodak machines, and customers had to switch to Kodak service even though they preferred ISO service. If customers did not want Kodak service, it was too late because they already had bought expensive Kodak machines. In effect, Kodak "locked in" the customers to the sale of service for Kodak machines, *i.e.* the Kodak "service market." The "Kodak service" and "Kodak parts" markets were considered "aftermarkets" of the Kodak photocopier machine "equipment market." The plaintiffs alleged, *inter alia,* that Kodak attempted to monopolize the Kodak service market.

Kodak argued that "Kodak services" was not a relevant market because a single brand of service never could be a relevant product market, as a matter of law. The **583 Supreme Court began its analysis by noting that whether a relevant market exists depends on cross-elasticity of demand. *See id.* at 469, 112 S.Ct. 2072; 481-82. Kodak claimed service was cross-elastic with the equipment,

because if Kodak raised the price of service too high, it would lose sales in the equipment market. *See id.* at 470, 112 S.Ct. 2072. The Court rejected this argument, finding that a customer who already had purchased expensive Kodak photocopiers might be deterred from switching to less-expensive, non-Kodak service, because to do so the customer would have to buy a new brand of photocopier. *See id.* at 476-77, 112 S.Ct. 2072. This "switching cost" created a genuine dispute of material fact as to whether the cross-elasticity of demand was reduced or eliminated, *see id.* at 477, 112 S.Ct. 2072, and therefore, whether a relevant "Kodak service" market existed. *See id.* at 482, 112 S.Ct. 2072.

The plaintiffs contend that because they produced evidence that switching to another geographic market would be too costly, there is a genuine issue of material fact as to whether the Louisa County market is a properly-defined relevant geographic market. *Eastman Kodak* is distinguishable because in that case it was the defendant who "locked in" the plaintiffs. Here, it is the plaintiffs who have locked themselves in. In *Eastman Kodak*, the defendant produced equipment that was unique, forcing customers to buy Kodak parts, and by implementing a change in policy with regard to the ISOs, also "forced [customers] to switch to Kodak service even though they preferred ISO service." *See Eastman Kodak*, 504 U.S. at 458, 112 S.Ct. 2072. The plaintiffs in the case at bar entered the Louisa County mining rights market, if such a market exists, with advance knowledge that establishing a mill would entail lock-in costs. This is evidenced by VVL's own Mr. Gumble, who testified that "The plant must be located within a certain distance to the mining site that allows the cost of transporting the vermiculite ore to remain low enough that the vermiculite operation can be profitable." (Gumble Aff. ¶ 3.)

**31 A plaintiff cannot establish a relevant geographic market by claiming to be "locked in" a market

that it entered knowing in advance that doing so would entail lock-in costs and other economic risks. *See Lee v. Life Ins. Co. of N. Am.*, 23 F.3d 14, 20 (1st Cir.1994) (observing that "the *timing* of the 'lock-in' at issue in *Kodak* was central to the Supreme Court's decision" (emphasis in original)).[22] The Third Circuit Court of Appeals addressed this issue in *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 439 (3d Cir.1997). In that case, franchisees of Domino's Pizza brought an antitrust action alleging a relevant product market limited to supplies used in Domino's Pizza stores. The district court dismissed plaintiffs' suit for relying on an impermissibly narrow market. On appeal, the plaintiffs cited *Eastman Kodak*in claiming the market was not too narrow, due to lock-in costs. Affirming the district court, the Third Circuit noted that the lock-in evidence was relevant in *Eastman Kodak* because the change in policy that caused the "lock-in" to Kodak service was not foreseeable by Kodak's customers. The court of appeals distinguished the *Queen City Pizza* case because, as franchisees, the plaintiffs had the opportunity *ex ante* to "assess the potential costs and economic risks at the time they signed the franchise agreement." *Id.* at 440.

The *Queen City Pizza* rationale can be applied to the present case. As Grace notes, when VVL began buying Louisa County mining rights in 1976, it knew that building a Virginia mill would result in lock-in costs. VVL also knew that available vermiculite reserves in that region *584 largely had been purchased by Grace, who likely would seek even more given its then-expected internal vermiculite needs for its own end-use products. The Fourth Circuit previously observed, "VVL entered into the vermiculite market by obtaining rights to one of the few Virginia deposits not already held by Grace." *Virginia Vermiculite*, 156 F.3d at 538. Similar to the franchisees in *Queen City Pizza*,

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[22] The Fourth Circuit has not addressed the question of lock-in costs under *Eastman Kodak*

VVL began doing business in Virginia with its eyes wide open, fully able to "assess the potential costs and economic risks at the time." *Queen City Pizza,* 124 F.3d at 440. VVL cannot now claim to be "locked in" to the Louisa County mining rights market. Even if it could, it has no antitrust economics expert who could testify why a lock-in effect alone establishes a geographic market.

A further distinction from *Eastman Kodak* is that the " 'commercial realities' faced by consumers" was a disputed fact in that case. *Eastman Kodak,* 504 U.S. at 482, 112 S.Ct. 2072 (quoting *United States v. Grinnell Corp.,* 384 U.S. 563, 572, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)). Here, evidence of the "commercial reality" of the market is undisputed: mining companies consider reserves available anywhere to them in determining where to establish a plant. The defendants proffered unrebutted expert testimony that, as a result, a properly-defined mining rights market must take into account, at a minimum, reserves from South Carolina and Montana. The plaintiffs have no antitrust economics expert who could testify that their proposed market is not, as the defense experts contend, invalid. "*Kodak*does not hold that the existence of ... switching costs alone ... renders an otherwise invalid relevant market valid." *Queen City Pizza,* 124 F.3d at 439 (footnotes omitted). The plaintiffs' proposed geographic market, therefore, is too narrow.

**32 Since the plaintiffs failed to produce sufficient evidence to establish a proper product and geographic market, their claims under § 1 of the Sherman Act must fail. Accordingly, it is unnecessary for the court to consider the remaining elements of § 1.

B. SHERMAN ACT § 2

Section two of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire to monopolize any part

of the trade or commerce among the several States." 15 U.S.C.A. § 2 (West 1997). The plaintiffs accuse Grace of monopolizing and attempting to monopolize the vermiculite concentrates market in North America, and accuse both defendants of conspiring to monopolize the same, all in violation of § 2.

1. MONOPOLIZATION

To prevail on their § 2 monopolization claim, the plaintiffs ultimately must prove three essential elements: (1) possession of monopoly power in a relevant market, (2) willful acquisition or maintenance of that power in an exclusionary manner, and (3) causal antitrust injury. *See Advanced Health-Care Servs., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 147 (4th Cir.1990). The plaintiffs' threshold burden under § 2 is to define a relevant market in which Grace allegedly exercises monopoly power. For their § 2 claims, the plaintiffs propose to define the relevant product market as vermiculite concentrates, including markets for three different grades of concentrates, "ultra-small," "small," and "mid-size." The plaintiffs' proposed relevant geographic market is North America, for all of their § 2 product markets.

The defendants first challenge the plaintiffs' proposed classification of vermiculite concentrates into separate product submarkets, claiming that although there may be different grades of vermiculite, each grade does not constitute a separate market.[23] HGSI, for example, asserts **585 that the United

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[23] Defining a "submarket" entails no further complexity than defining a "market"; whether any particular proposed market is called a "market" or a "submarket," the plaintiffs' burden, and the inquiry for the court, is the same. *See Satellite Television*, 714 F.2d at 355 n. 5 ("The use of the term 'submarket' is to be avoided ... a product group or geographic area either meets the listed criteria ... or it does not.... No fiddling with nomenclature will change the analysis or result.").

States grading system exists for convenience, and not because of any market differences, noting that the largest producer of vermiculite, Palabora from South Africa, uses a different grading system. The defendants attempt to discharge their summary burden by providing evidence of reasonably interchangeable substitution between grades, and by pointing to an absence of evidence--specifically, any rudimentary cross-elasticity analysis of these substitutes--to support a submarket definition of any particular grade that excludes the other grades. *See Celotex*, 477 U.S. at 325, 106 S.Ct. 2548.

The defendants offer evidence from both parties that different grades of vermiculite can be used interchangeably for various end-uses. Grace produced a VVL investment feasibility study indicating that either mid-size or small grade concentrate can be exfoliated and used to produce a concrete aggregate mixture, which is used in construction of concrete roof decks and industrial buildings, and concrete in-ground pools. According to VVL, using vermiculite to produce concrete aggregate is "the single largest use for vermiculite in North America." (VVL Investment Feasibility Study, Grace S.J. Mem. Ex. 20 at 5.) Grace also produced the report of a VVL expert, Mr. John Stamberg, and deposition testimony from Messrs. Schmelzer and Stamberg, to support its claim of inter-grade substitution for concrete aggregate. This expert report and deposition testimony also evidence inter-grade substitution between small and mid-size vermiculite for other end-uses, including the production of fertilizer products, masonry insulation, refractory blocks, absorbent socks and pads for cleaning oil and chemical spills, and molten steel ladle topping. Grace also produced evidence that either small or ultra-small vermiculite can be used to produce fire-rated drywall.

**33 For their theory that separate markets exist for each grade of vermiculite concentrate, the plaintiffs rely only on the now-excluded expert report of Mr. Schwartz, evidence that the prices vary sharply between the different grades, and evidence that Grace raised the price of mid-size concentrate by 55% (as adjusted for inflation) from 1993 to 1998. The plaintiffs again rely on the Guidelines's 5% figure, stating that Grace would be able to sustain a 5% increase in price for any particular grade because each grade sells at a price more than 5% above the next-smaller size. They further argue that a sustained 55% price increase in mid-size concentrates conclusively establishes that mid-size concentrates constitute a separate market.

The plaintiffs' evidence suffers from fundamental deficiencies. Without an expert economist, the plaintiffs have no evidence that the inferences they draw from the price differences and price increase are economically sound. As indicated above, *see* Part II.A.2.(B) *supra,* the court will not permit the jury to apply the Guidelines mechanically. Market definition does not turn only on price differences or increases in price. The plaintiffs ignore that the relevant product market must include "those products or services which are 'reasonably interchangeable by consumers for the same purposes.' " *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Va., Inc.* 714 F.2d 351, 355 (4th Cir.1983) (quoting *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 395, 76 S.Ct. 994, 100 L.Ed. 1264 (1956)). For example, Grace asserts that the price increase was due to an attempt to regulate "mine imbalance." With increased mining costs and increased demand for mid-size concentrate, Grace asserts that, of the ore it mined, the **586 demand for mid-size was disproportionate to the demand for small grade, resulting in waste of the small grade. As a result, there was excess production of small grade compared with mid-size grade, requiring Grace to discard some production of small grade vermiculite. Grace calls this a

demand- and cost-induced price change. The defendants produced evidence that the reason Grace increased the price of mid-size grade was to induce customers to buy more small grade. (*See* Rogan Dep. at 79 ("[I]n 1996 we raised out price for [mid-size] with the expected outcome that we would ... hopefully switch some customers from [mid-size] to [small grade].").) VVL argues that market definition is not concerned with the legitimacy of a price increase. While this evidence does suggest the price increase was not the result of market power--another inference the plaintiffs have no expert to challenge--at this stage the court is concerned more with the suggestion that mid-size and small grade concentrates are interchangeable substitutes. If increasing the price of mid-size vermiculite causes consumers to switch to small grade vermiculite, then the latter appears to be a substitute for the former. The point is not that these inter-grade substitutes necessarily should be included in the plaintiffs' proposed product market--that would be a question for the jury-- rather, the point is that the plaintiffs have no evidence to show why the potential substitutes should not be so included.

For the purposes of § 2 no less than § 1, in the face of evidence that different grades of vermiculite are used interchangeably by consumers for the same purposes, it is the plaintiffs' burden to conduct some rudimentary analysis of the products' functional interchangeability, and of competition and cross-elasticity between grades, to show that the substitution is not economically relevant. *See Satellite Television*, 714 F.2d at 355-56; *Adidas Am., Inc. v. National Collegiate Athletic Ass'n*, 64 F.Supp.2d 1097 (D.Kan.1999) (collecting cases). The plaintiffs conducted no such analysis. As in *Satellite Television*, "it is exactly this failure ... that is fatal to [their] submarket theory." *Id.* at 356.

**34 VVL claims that even if there are not separate markets for mid-size, small, and ultra-small grades of vermiculite, these all are "non-coarse" grades of vermiculite, which would constitute a separate market, independent of the "coarse" grade of vermiculite. Its only evidence of such a "non-coarse" market is the difference in price between "coarse" grade and other grades. As noted, such evidence alone is insufficient to define a relevant product market.

In addition to challenging the existence of vermiculite submarkets, the defendants challenge the plaintiffs' limiting the product market to vermiculite, and claim that vermiculite is part of a larger market composed of many different products, including non-vermiculite products, that can be used for the same purposes. To discharge their burden, the defendants produce evidence of competition and reasonably interchangeable substitution between vermiculite and non-vermiculite products for a variety of end-uses, and point to an absence of evidence--again, a rudimentary cross-elasticity analysis of these substitutes--to support a product market definition that excludes the non-vermiculite substitutes. *See Celotex*, 477 U.S. at 325, 106 S.Ct. 2548.

Both HGSI and Grace reported substitutes for vermiculite in most of the mineral's uses. These substitutes were not accounted for in the plaintiffs' analysis of the relevant product market. For instance, the defendants produced evidence that peat moss and perlite are substitutes for or complements of vermiculite used in professional soil mixes, and that polystyrene, mineral wool, and perlite can be used instead of vermiculite in spray-on fireproofing for steel beams and columns. Grace itself substituted polystyrene for vermiculite in its lightweight concrete roofdeck and spray-on fireproofing products. In fertilizer products, a large number of consumers eliminated vermiculite in favor of **587 perlite, polystyrene, ground-up

corn cob, or other organic and liquid materials. A non-party fertilizer producer testified that his vermiculite-based fertilizer competes against other manufacturers' non-vermiculite-based fertilizer. The defendants produced evidence that sand- based concrete can substitute for vermiculite in the production of swimming pool concrete aggregate, and that coarse sand is used as a substitute for vermiculite to produce the pool base of above-ground plastic-lined pools. Additionally, the defendants produced evidence that adding vermiculite to dry- wall is not required to satisfy a certain type of fire-rating. Consequently, many dry-wall manufacturers no longer use vermiculite in this product, but use fiberglass or clay instead, which serves the same purpose as vermiculite at a much cheaper cost.

The defense experts conducted a basic cross-elasticity analysis of these substitutes, and concluded that even if these substitutes do not cover all of the potential end-uses for vermiculite, "The existence of a variety of substitutes in a variety of applications indicates that even a hypothetical monopolist supplier of vermiculite would be unable to profitably increase price." (Godek Report at 15.) Neither the plaintiffs nor their experts conducted any such analysis. Without a coherent cross-elasticity analysis showing that these substitutes are not reasonably interchangeable with vermiculite and should be excluded from the market, the plaintiffs as a matter of law cannot carry an essential element of their § 2 monopolization case. (*See also* note 18 *supra.*)

**35 Faced with this array of substitutes and evidence that they compete with and constrain the price of vermiculite, the plaintiffs respond, in an apparent last-ditch effort to define a relevant product market, that many are substitutes for expanded vermiculite, and not vermiculite concentrate. This does not cure their failure to analyze whether the downstream substitutes for expanded

vermiculite should or should not be included in the relevant product market. The plaintiffs cannot now claim plausibly that expanded vermiculite should be excluded from the relevant product market, given VVL's own admissions that most of the vermiculite Grace sold to the public was expanded vermiculite, not vermiculite concentrate, and that VVL sells only vermiculite concentrate (primarily to independent expanders). To attempt to restrict the product market even further in this manner, VVL would require some economic analysis to demonstrate that VVL and Grace even compete in the same market. (Indeed, if the market were limited to sales of concentrate to independent expanders, VVL, not Grace, would have monopoly power, as it "controlled" over 70% of that "market" from 1992 to 1998.) Moreover, evidence that some non-vermiculite products are substitutes for vermiculite concentrate, such as fiberglass for use in fire-rated drywall, combined with the plaintiffs' failure to conduct any cross-elasticity analysis, alone is fatal to the plaintiffs' vermiculite concentrates market theory.

To summarize, the plaintiffs failed to produce evidence of "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). Therefore, the plaintiffs do not have sufficient evidence that the defendants' proposed substitutes for vermiculite should be excluded from the definition of the relevant product market. Since no reasonable jury could limit the relevant § 2 product market to vermiculite concentrates or submarkets of vermiculite concentrates under the evidence in the record, summary judgment shall be granted in favor of the defendants on all of the plaintiffs' § 2 claims that require market definition. This includes the plaintiffs' monopolization claims.

2. ATTEMPTED MONOPOLIZATION

**36 To establish Grace's liability for attempted monopolization in violation of **588 § 2, the plaintiffs ultimately must prove: (1) a specific intent to monopolize; (2) a relevant market; (3) predatory or anticompetitive acts; and (4) a dangerous probability of successful monopolization. *See Advanced Health-Care Servs., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 147 (4th Cir.1990). In *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993), the United States Supreme Court held specifically that a defendant "may not be liable for attempted monopolization under § 2 of the Sherman Act absent proof of ... the relevant market." *Id.* at 459, 113 S.Ct. 884. Having insufficient evidence to establish the vermiculite concentrates market as a relevant product market for their § 2 claims, the plaintiffs are unable to prove that Grace attempted to monopolize any properly-defined market. Summary judgment shall be granted in favor of the defendants on the plaintiffs' § 2 attempted monopolization claims.

The Peers only asserted federal antitrust claims for § 1 restraint of trade, § 2 monopolization, and § 2 attempted monopolization. Having found that the plaintiffs produced insufficient evidence to support those claims, all of the Peers' federal antitrust claims shall be dismissed.[24] The only remaining federal antitrust claim that the court must examine is VVL's § 2 conspiracy to monopolize claim against both defendants.

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24 Consequently, the court does not need to address the question of the Peers' antitrust standing, or the viability of their antitrust damages claims.

3. CONSPIRACY TO MONOPOLIZE

The elements of a § 2 conspiracy to monopolize claim are: (1) concerted action; (2) a specific intent to achieve an unlawful monopoly; (3) commission of an overt act in furtherance of the conspiracy, *see Advanced Health Care*, 910 F.2d at 150; and (4) antitrust injury. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 139, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998). Unlike in an attempted monopolization claim, "it is not necessary that the committed acts, themselves, be predatory." *Advanced Health-Care*, 910 F.2d at 150. VVL claims that Grace and HGSI conspired to monopolize the alleged vermiculite concentrates market in North America.

(A) CONCERTED ACTION

VVL challenges the same conduct for its § 2 conspiracy claim as it does for its § 1 restraint of trade claim. As discussed in Part II.A.1 *supra*, VVL produced evidence that sufficiently excludes the possibility that the defendants acted independently. Grace's reliance on *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 139, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998), is misplaced. There the Supreme Court held that the plaintiff could not establish that a vertical arrangement constituted a collective group boycott so as to merit application of the *per se* rule under § 1, that the plaintiff therefore showed no harm to the competitive process, and that a conspiracy to monopolize claim based on the same non-collective behavior also failed to establish harm to the competitive process. In the instant case, the question is not whether a vertical arrangement resulted in a group boycott so as to merit application of the *per se* rule; the court already found in discussing the alleged § 1 conspiracy that VVL produced sufficient evidence that the defendants acted in concert, in what appears to be a type of horizontal arrangement, to harm VVL and to foreclose the Virginian vermiculite reserves. Therefore, *NYNEX* is inapposite.

(B) SPECIFIC INTENT AND OVERT ACTS

**37 The defendants argue that because VVL does not have sufficient evidence to establish a relevant market, VVL likewise is unable to establish any particular market in which the defendants allegedly intended to achieve an unlawful monopoly. VVL argues that proof of a relevant market is unnecessary to establish a conspiracy to monopolize claim, because § 2 conspiracies primarily are concerned with concerted action and intent, which does not require precise delineation of the market. Neither the United States Supreme Court nor the Fourth Circuit Court of Appeals has addressed directly whether rigorous economic proof of a relevant market, of the type discussed *supra*, is required for a § 2 conspiracy to **589 monopolize claim.[25]

The Supreme Court made clear, however, that it is not necessary to have as much proof to sustain a § 2 conspiracy claim as is required to sustain a monopolization claim. In *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946), the Court observed that a § 2 conspiracy claim "is a different offense from the crime that is the object of the conspiracy." *Id.* at 789, 66 S.Ct. 1125 (quoting *United States v. Rabinowich*, 238 U.S. 78, 85, 35 S.Ct.

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25 HGSI cites *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490 (4th Cir.1986), for the proposition that § 2 conspiracy claims require proof of a relevant market. In that case, however, the plaintiffs did not allege a claim for conspiracy to monopolize, but only monopolization and attempted monopolization claims. *See Consul, Ltd. v. Transco Energy Co.*, 596 F.Supp. 432, 434 (M.D.N.C.1984). In stating that "proof of a relevant market is always required," *Consul*, 805 F.2d at 494 n. 9, the Fourth Circuit simply disagreed with the Ninth Circuit rule that proof of a relevant market is not always required in an attempt to monopolize case; the Supreme Court later rejected that Ninth Circuit view in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993) (holding that attempt to monopolize claims require proof of the relevant market to establish a "dangerous probability" of successful monopolization).

682, 59 L.Ed. 1211 (1915)). The Court emphasized that concert of action and intent are the principal elements of a § 2 conspiracy to monopolize claim: "Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified." *Id.* at 810, 66 S.Ct. 1125. A § 2 conspiracy claim does not require proof that the defendants "ever ... acquired the power to carry out the object of the conspiracy." *Id.* at 789, 66 S.Ct. 1125. Rather, a party may be convicted of conspiring to monopolize "any part of the trade or commerce among the several states." *Id.* Similarly, in *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) (holding that a parent and a subsidiary cannot conspire in violation of the Sherman Act), the Court reiterated that "it is enough if some appreciable part of interstate commerce is the subject of a ... conspiracy," adding that the defendants' "relative position in the field of ... production has no necessary relation to the[ir] ability ... to conspire to monopolize." *Id.* at 225-26, 67 S.Ct. 1560. *See also United States v. Griffith*, 334 U.S. 100, 107 n. 9, 68 S.Ct. 941, 92 L.Ed. 1236 (1948) (noting that "a conspiracy to monopolize violates § 2 even though monopoly power was never acquired" (citing *American Tobacco*)), *overruled on other grounds by Copperweld, supra.*

In *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8th Cir.1982), the Eighth Circuit held that because the essential elements of § 2 conspiracy claims are concerted action and intent to monopolize--not market power--and because a plaintiff only must establish that the conspiracy affected "some appreciable part of interstate commerce," *id.* at 1182 (quoting *Consolidated Laundries*, 291 F.2d at 573), rigorous proof of the relevant market is not required for § 2 conspiracy claims. "A section 2 claim for conspiracy to

monopolize ... generally does not require proof of a relevant market, at least not in the manner required in actual and attempted monopolization cases." *Id.* at 1181. The court of appeals cautioned that § 2 conspiracies could not be based on abstract proof of bad intent:

> **590 ** 38 [A] civil Section 2 conspiracy claim, standing alone, does require a minimal showing of product and geographic context--upon what and where the alleged conspiracy is focused--to ensure that a claim is not based upon some abstract showing of unlawful intent. The nature of such proof, however, is simply to show the context of the conspiracy. It need not be as rigorous as the relevant market showing for other Section 2 claims, because actual attainment or "dangerous probability" of monopoly power is not at issue in a conspiracy claim.

Id. This view is supported by a recent Supreme Court case discussing attempts to monopolize. In *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993), the Supreme Court found that a relevant market determination was an essential element to prove the "dangerous probability" element of an attempt case, but also noted that evidence of unfair or predatory tactics alone, without proof of a relevant market, "may be sufficient to prove the necessary intent to monopolize" for a § 2 attempt case. *Id.* at 459, 113 S.Ct. 884. If defining the relevant market is not required to show intent to monopolize for a § 2 attempt case, it follows that defining the relevant market is not required to show intent to monopolize for a § 2 conspiracy case. *See also Monument Builders of Greater Kansas City, Inc. v. American Cemetery Ass'n,* 891 F.2d 1473, 1484 (10th Cir.1989) ("Conspiring to monopolize is a separate offense under section 2, requiring less in the way of proof than the other section 2 offenses." (quoting *Perington*

Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369, 1371 (10th Cir.1979)); *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, 438 (10th Cir.1983) (holding that for a conspiracy to monopolize claim, "[a] relevant market need not be established"); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir.1961) (holding that the relevant market need not be proven in detail to establish a § 2 conspiracy because an accurate delineation of the market is not required to prove intent, the essential element for a § 2 conspiracy claim) (citing *Yellow Cab*, 332 U.S. at 225-26, 67 S.Ct. 1560)).[26]

The defendants argue that because VVL utterly failed to provide sufficient evidence that vermiculite concentrates constitute a relevant product market, and because there is substantial evidence that many other non-vermiculite products should be included in the relevant product market, the defendants potentially could be held liable under § 2 for conspiring to monopolize a market that in fact does not exist. Factual impossibility, however, is not a defense to conspiracy. Under the common law, a person could be guilty of a conspiracy to commit a crime, even though it was impossible in fact to achieve the goal of the conspiracy. *See United States v. Palmer*, 203 F.3d 55, 64 (1st Cir.2000) (observing that factual impossibility is not a defense to conspiracy). Even if it is factually impossible for the defendants to monopolize the vermiculite concentrates market, they still may be held liable for conspiring to do so. As stated above, a § 2 conspiracy claim "is a different offense

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[26] The Fifth and Eleventh Circuits do not share the view of the Second, Eighth, and Tenth Circuits. *See Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 311 (5th Cir.1997) ("To establish Section 2 violations premised on attempt and conspiracy to monopolize, a plaintiff must define the relevant market."); *Bill Beasley Farms, Inc. v. Hubbard Farms*, 695 F.2d 1341, 1343 (11th Cir.1983) ("In this circuit it is clear that relevant market is a necessary element of a conspiracy to monopolize.") (citing *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 849 (5th Cir.1975)).

from the crime that is the object of the conspiracy." *American Tobacco*, 328 U.S. at 789, 66 S.Ct. 1125 (quoting *United States v. Rabinowich*, 238 U.S. 78, 85, 35 S.Ct. 682, 59 L.Ed. 1211 (1915)). The reason that specific market delineation is important in § 1 claims, and in § 2 monopolization and attempted monopolization claims, is because the ***591** fact-finder must be able to determine whether the defendants actually restrained trade, actually achieved and maintained monopoly power, or came dangerously close to actually achieving monopoly power. The same specific delineation of the market is unnecessary to prove a § 2 conspiracy, because its "essential elements ... are concerted action and specific intent to monopolize," *Alexander*, 687 F.2d at 1182, and the required intent is simply intent to monopolize a product that "appreciabl[y][is] part of interstate commerce." *Yellow Cab*, 332 U.S. at 225, 67 S.Ct. 1560. Accordingly, the court finds that although a product and geographic context for the conspiracy must be established, a rigorous economic definition of the relevant market is not required to sustain a claim for conspiracy to monopolize under § 2.

****39** It is undisputed that Grace and VVL are the second- and third- largest producers of vermiculite in the world (after South Africa's Palabora), and that, until recently, Grace and VVL were the only domestic competitors in the production and sale of vermiculite concentrates. It also is undisputed that vermiculite concentrates are sold throughout the United States, *i.e.* in interstate commerce, and that, at minimum, North America is a relevant geographic context for vermiculite sales. This evidence is sufficient to establish vermiculite concentrates in North America as a product and geographic context and target of the alleged conspiracy between Grace and HGSI.

The plaintiffs produced sufficient evidence to create a genuine dispute of material fact as to whether the defendants entered into a conspiracy with the specific intent--*i.e.* common design and purpose--that Grace monopolize vermiculite concentrates production and sales in North America, directed toward the exclusion of Grace's only domestic competitor in that part of interstate commerce. *See American Tobacco,* 328 U.S. at 810, 66 S.Ct. 1125 (holding that a conspiracy is established if the defendants had "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement"); *Williams v. 5300 Columbia Pike Corp.,* 891 F.Supp. 1169, 1175 (E.D.Va.1995) ("a conspiracy to monopolize must be one that is somehow rationally directed toward the exclusion of competitors."). Internal Grace documents suggest that Grace believed vermiculite concentrates in North America constitute a distinct market. For instance, one Grace document states that "[t]he ability of new competitors to enter the vermiculite market is severely hampered by limited access to commercial vermiculite deposits ... The small number of competitors in the vermiculite market combined with the high barriers to entry for new competitors has limited the intensity of rivalry among competitors." (Grace 1986-1991 Business Plan, Pls.' Opp'n Ex. 33 at G2440- 41.) Another Grace document describes Grace's vermiculite business as being "the leader in the North American vermiculite market." ("Grace Vermiculite" Descriptive Memorandum, Pls.' S.J. Mem. Ex. 1 at G16770a.) In addition, the evidence described in the discussion of the § 1 conspiracy is sufficient to create a genuine dispute of material fact as to whether the defendants, acting in concert, conspired to eliminate VVL as Grace's only domestic competitor, and thereby enable Grace to monopolize the production and sale of vermiculite concentrates in North America. That evidence includes, for example: evidence that Grace quantified the value to itself of VVL's closing in Virginia

due to a lack of reserves; evidence that Grace entered into the HGSI transactions with an eye toward keeping reserves from VVL; evidence that Grace and HGSI withheld the A.D. Peers donation until they could determine whether VVL would run out of Virginian concentrates; and evidence that HGSI stopped making payments on its Nininger lease when it realized VVL would continue to produce vermiculite in Virginia. This evidence, along with the letters *592 exchanged between the defendants, indicating HGSI's intent to mine and Grace's intent to keep VVL from mining, also could lead a reasonable jury to find that HGSI stood to gain separately from Grace's acquisition of monopoly power in the alleged market for vermiculite concentrates, and in that sense can be deemed to share in Grace's alleged specific intent to obtain a monopoly. Alternatively, a reasonable jury could find, for example, that HGSI intended that Grace obtain a vermiculite concentrates monopoly so that HGSI would not be threatened by any mining company in Virginia: VVL would be out of business in Virginia, and Grace would not mine in Virginia pursuant its mutual agreement with HGSI. All of this evidence reasonably could establish that Grace and HGSI believed vermiculite concentrates in North America constitute a market, that Grace specifically intended to monopolize that alleged market, that HGSI stood to gain from such monopolization and shared Grace's intent, and that the Grace-HGSI transactions were conspiratorial efforts to eliminate the only other domestic producer of vermiculite concentrates, VVL, from that part of interstate commerce. Therefore, summary judgment on these issues shall be denied.

(C) ANTITRUST INJURY

**40 The Clayton Act provides a private party--as opposed to the United States Department of Justice or the Federal Trade Commission--with standing to sue for violations of the Sherman Act. Clayton Act § 4 authorizes private actions for treble damages, and § 16 authorizes private actions for injunctive relief.[27] The United States Supreme Court established several requirements to determine whether an antitrust plaintiff has standing to seek antitrust remedies under the Clayton Act. *See Cargill v. Monfort of Colo., Inc.*, 479 U.S. 104, 109-10 & n. 5, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 219-20 (4th Cir.1987). The first requirement is that the plaintiffs have suffered "antitrust injury"; if this is satisfied, then other factors, such as direct causation in fact between the plaintiffs' injury and the defendants' alleged antitrust violations, also must be considered to determine whether the plaintiffs may sustain a claim under the Clayton Act. *See Cargill*, 479 U.S. at 110 n. 5, 107 S.Ct. 484; *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). The court shall examine antitrust injury in this Part, and the other standing requirements in the next Part.

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[27] Section 4 provides, in relevant part, that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained." 15 U.S.C.A. § 15(a) (West 1997). Section 16 provides, in relevant part, that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C.A. § 26 (West 1997).

The Supreme Court defined antitrust injury in *Brunswick:*

> [A]ntitrust injury ... is ... injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations ... would be likely to cause."

Brunswick, 429 U.S. at 489, 97 S.Ct. 690 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 125, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969)) (holding that the defendant's acquisition of defaulting bowling centers such that the centers remained in business, did not result in "antitrust injury" to the centers' competitors, ***593** who would have realized market share gains had the centers gone out of business). Specifically with regard to § 2 conspiracy claims, the Supreme Court held in another case that a plaintiff must have sufficient evidence to establish "harm, not just to a single competitor, but to the competitive process, *i.e.,* to competition itself." *NYNEX Corp. v. Discon, Inc.,* 525 U.S. 128, 135, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998). *See also id.* at 139 (applying this principle to § 2 conspiracy claim). To prove harm to the competitive process, the plaintiffs must prove that "the damages sought ... flow from that conduct which is proscribed by the antitrust laws." *Thompson Everett, Inc. v. National Cable Advertising, L.P.,* 57 F.3d 1317, 1325 (4th Cir.1995) (citation omitted) (emphasis omitted). *See also Sullivan v. National Football League,* 34 F.3d 1091, 1097 (1st Cir.1994) ("[A]n action harms the competitive process 'when it obstructs the achievement of competition's basic

goals--lower prices, better products, and more efficient production methods.' " (quoting *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir.1990))).

VVL may satisfy its burden by producing evidence that the damages its seeks flow from the defendants' alleged § 2 conspiracy to achieve an unlawful monopoly in vermiculite concentrates, such that the concerted action obstructed achievement of lower vermiculite concentrates prices,[28] a better vermiculite concentrates product, or more efficient vermiculite production methods. As indicated in a damages report prepared by VVL's damages expert, Mr. Robert Sansom, VVL claims four types of damages:

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[28] VVL produced evidence that the price of mid-size concentrate increased by 55% (adjusted for inflation) from 1993 to 1998. However, in light of the defense economists' testimony that these higher prices were due to increased demand and increased costs, and VVL's absence of any economic testimony the price increase was not caused by these conditions, which are wholly consistent with a competitive market, no reasonable jury could conclude that these higher prices "flowed from" conduct that is proscribed by the antitrust laws.

1. Past lost profits, from 1993 to 1994. VVL claims that production on its Brandy B property declined from 1993 to 1994 when VVL was delayed in opening the Brandy B reserves. It claims it was delayed because the *Brandy* court issued a temporary injunction that prohibited it from mining the Brandy property. [29]

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[29] VVL's damages report, prepared by Mr. Sansom, refers only to production decline on the Brandy B property, due to the *Brandy* injunction, as supporting its claim of past lost production profits. On the second day of oral argument, counsel for VVL alluded to past lost profits due not only to production decline on the Brandy B property, but also due to VVL's having been denied access to the Peers, the Nininger, and Brandy A properties from 1992 to 1993, which VVL allegedly would have obtained at lower royalty rates and begun mining. Aside from two very brief, unsupported statements to this effect in VVL's opposition papers, (*see* Pls.' Opp'n at 30, 32), counsel's statement at oral argument was the only indication that VVL claimed past production losses for anything other than production decline on the Brandy B property. Those statements are unsupported by any record evidence, and are not referred to anywhere in VVL's August 1999 damages report. Moreover, on the first day of oral argument, counsel for VVL recognized that VVL did not include these past production profits in its damages calculations, and suggested that VVL purposefully did not do so. (*See* May 10, 2000 Tr. at 104 ("VVL would have had the Nininger and all other reserves much earlier.... It would have meant we would have had reserves at a lower royalty rate for a lot longer.... Had we presented damages on those assumptions, we would have gotten a much larger figure. We would have then been accused of running up damages. What we chose to do was to choose a more conservative alternative not following that scenario ...").) The court therefore construes VVL's past lost production profits claim as encompassing only the losses caused by a decline in production on the Brandy B property from 1993 to 1994.

2. Past and future transportation damages, from 1994 to 2012. VVL alleges that it could not conduct off-road hauling of the ore and tailings mined at the Brandy and A.D. Peers Parcel A properties to the processing *594 plant at Purcell, due to HGSI's M.F. Peers property being situated directly between Purcell and the others. VVL bases its past transportation costs figure on actual costs of on-road hauling of raw ore to VVL's plant, and bases its future transportation costs on the projected costs of hauling raw ore to the mine, and pumping fine tailings back to the mine site for restoration, up to the time that it anticipates it will deplete its Virginia reserves.

3. Future plant move damages, from 2000 to 2001. VVL claims that in 2000-2001 it may move its mill from the Purcell property to the Brandy property, which would require that VVL expend costs to restore the Purcell site, ponds, and roads. VVL asserts these damages only as an alternative to the future transportation damages, as an effort to mitigate those damages. By moving its mill, VVL will not have to conduct off-road hauling and incur future transportation costs.

4. Future lost profits, from 2012 to 2020. VVL claims it will deplete its current Virginia reserves in 2012 because it does not control the Peers' properties. VVL asserts that if it had the Peers' properties, it could continue to mine at its current rate of production until 2020. Assuming stable

> market conditions, a stable production rate, a stable profit margin, and assuming VVL obtains no additional Virginia properties, such as Nininger, VVL asserts it will lose profits from 2012 to 2020 due to the foreclosure of the Peers' properties.[30]

The defendants argue that the past lost profits allegedly due to the *Brandy* court's temporarily enjoining VVL from mining Brandy B, do not constitute "antitrust injury." As discussed above, VVL cannot support its conspiracy claim with evidence that the defendants intended to prevent mining on Brandy B. Consequently, any injury resulting from the *Brandy* litigation does not flow from an anticompetitive aspect of the alleged conspiracy, and does not constitute antitrust injury. VVL's past lost profits claim is no longer viable, and summary judgment shall be granted in the defendants' favor on this issue.

The defendants also assert that the transportation costs are not antitrust injury. Costs of transporting ore to a mill, they claim, are part of doing business as a mining company, and do not constitute harm to competition. The defendants observe that although the M.F. Peers property

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30 Attempting to buttress the speculative nature of these future lost profits, VVL claims that it currently has a depreciated business value because it does not control the donated reserves, stating that "[a]ny investment banker would conclude that VVL's worth is lessened by denial of access to reserves, and the denial of these reserves is a concrete present injury that ... limits the amount VVL could be sold for today." (Pls.' Opp'n at 33.) VVL produced no evidence from any investment banker to support damages for lost "present business value," or "going concern value," and did not refer to such damages in its damages report. Having no specific evidence to support this vague claim, VVL cannot recover damages based on a general depreciation of its current business value from its lack of control over more reserves than it currently possesses.

lies between VVL's Brandy and Purcell properties, VVL's using the road that circumvents the M.F. Peers property (Route 22) to transport ore from Brandy to the mill at Purcell only results in an inconvenience of one to two miles of additional transportation distance. The defendants cite evidence that both VVL and Grace transport South Carolinian ore over twenty miles to their respective mills in South Carolina. The question, however, is not whether transportation costs are a normal part of doing business, but whether VVL has evidence that the defendants harmed the competitive process by their alleged conspiratorial acts. Such evidence might include, for example, evidence that the defendants' alleged conspiratorial acts intentionally were designed to render VVL's production methods less efficient. VVL produced evidence that shortly after VVL approached Grace to inquire about using the M.F. Peers property to conduct off-road hauling between VVL's Brandy property *595 and VVL's mill, Grace donated the M.F. Peers property to HGSI with restrictive covenants relating to using the property to transport vermiculite, even though none of the parties believed that that particular M.F. Peers parcel contained vermiculite reserves. VVL also produced evidence that it sustained transportation costs due to its inability to use an off-road transportation route through the M.F. Peers property. By this evidence, a reasonable jury could infer that Grace purposefully donated the M.F. Peers property to make its only domestic competitor, VVL, incur transportation costs (in turn furthering the conspiracy to monopolize) and be less efficient in production. Based on evidence that VVL incurred such costs, a reasonable jury could conclude that VVL's production methods were rendered less efficient by the defendants' allegedly conspiratorial acts, resulting in harm to competition. Although two miles is not a long distance to travel, VVL produced sufficient evidence that these transportation costs, if caused in fact by the defendants' actions, "flowed from" the defendants' alleged

conspiracy to monopolize--which included the donation of the M.F. Peers property to HGSI--and thus constitute antitrust injury. The defendants provided evidence that VVL could remain profitable with hauling distances up to twenty miles, and claim that competition therefore was not harmed. Although the defendants' evidence is compelling, this is the type of factual dispute that must be heard and resolved by the jury.

**42 The court must assure itself that VVL provided sufficient evidence to establish that its other claimed damages constitute antitrust injury, even though the defendants only asserted an "antitrust injury" challenge to the transportation costs and past lost profits damages. To the extent the "plant move" damages are mitigating damages VVL intends to sustain as an alternative to the future transportation costs, they also constitute antitrust injury, because costs incurred to mitigate costs that flow from an antitrust violation, also flow from that violation. Grace produced evidence that VVL's decision to move its plant is an independent business decision, completely unrelated to any conduct by the defendants. Whether VVL decided to move its plant to mitigate its future transportation damages, or whether it did so as an independent business decision, is a question for the jury. With regard to VVL's future lost profits claim, the court shall assume for the moment that VVL has sufficient evidence to establish that its future lost profits are reasonably ascertainable and will be caused in fact by the defendants' alleged conspiratorial actions. If the defendants conspired to enable Grace to monopolize the concentrates market, and foreclosed reserves to eliminate VVL from that market in furtherance of the conspiracy, a reasonable jury could determine that future lost profits damages resulting from the foreclosure of those reserves would be the type of injury that the antitrust laws were designed to prevent. VVL having produced sufficient

evidence to establish each of the essential elements of its conspiracy to monopolize claim, summary judgment shall be denied on this issue.

C. CLAYTON ACT REMEDIES

1. DAMAGES (§ 4)

****43** "'Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.' ... the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters,* 459 U.S. 519, 534-35, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) (quoting *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 263 n. 14, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972)). Whether VVL may recover for the injuries it allegedly suffered by reason of the defendants' actions requires inquiry into: (1) causation in fact between an antitrust violation *** 596** and harm to the plaintiff; (2) the risk of duplicative recovery by multiple antitrust claimants; (3) the extent to which the claim is based upon speculative, abstract, or impractical measures of damages; (4) the (proximate) causal connection between the alleged violation and the harm suffered; and (5) the relationship of the injury alleged to the forms of injury about which Congress was concerned when it created a private remedy. *See id.* at 537-43, 103 S.Ct. 897; *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.,* 828 F.2d 211, 219-20 (4th Cir.1987). If a genuine dispute of material fact is shown, "the fact of injury and the amount of damages are questions for the jury to decide." *International Wood Processors v. Power Dry, Inc.,* 792 F.2d 416, 431 (4th Cir.1986). The defendants argue that VVL did not produce sufficient evidence of causal injury in fact as to any of its damages claims, that those claims pose an unreasonable risk of duplicative recovery, and that all VVL's claims for

future damages are impermissibly speculative. If VVL's future lost profits damages claim is so speculative as to not be ascertainable by just and reasonable inference, it will be unnecessary to examine all of the *Associated General* factors with regard to future lost profits. Accordingly, the court shall begin with VVL's future lost profits claim for damages.

(A) FUTURE LOST PROFITS

The calculation of VVL's future lost profits assumes stable market conditions, stable production levels, and stable profit levels over a period of twenty years, from the present until the year 2020. (*See* Sansom Report at 3 (assuming that VVL's current "tons per year" production rate, and VVL's average annual profits, will remain constant); Sansom Dep. (Oct. 27, 1999) at 50 (same).)

The defendants argue that whether VVL will accrue future lost profits is so speculative, and based on so many assumptions, that no reasonable jury could award VVL lost profits damages for a twenty-year period in the future. The first assumption is that VVL will deplete its Virginia reserves in 2012. The undisputed evidence is that the Nininger property currently is unleased, and if VVL obtained it, it would not deplete its reserves in Virginia until 2020. The second assumption is that vermiculite market conditions will be stable over a twenty-year period, from now until the year 2020. Grace produced evidence, largely undisputed, that the vermiculite market has changed dramatically over the past ten years. Undisputed evidence shows that domestic sales of imported mid-size vermiculite increased from 5,365 tons in 1992 to over 43,000 tons in 1998, and overall imports more than doubled from 1991 to 1998. The defendants also produced evidence, in the form of investment reports and deposition testimony,

that demand for vermiculite has decreased over the past ten years due to increased use of and/or demand for substitute products. It also is undisputed that a new entrant in the vermiculite market recently began operations in Montana.

The court recognizes that proof of the extent of damages is subject to a more lenient standard of proof. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1043 (4th Cir.1987). Notwithstanding the lenient standard, antitrust damages are not recoverable if they only can be determined "by mere speculation or guess." *Story Parchment*, 282 U.S. at 563, 51 S.Ct. 248. The evidence must be sufficient to establish the extent of the damages "as a matter of just and reasonable inference." *Id. See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) ("[I]n antitrust actions as in others ... future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable."); *Eastern* *597 *Auto Distribs., Inc. v. Peugeot Motors of Am., Inc.*, 795 F.2d 329, 337 (4th Cir.1986) (affirming exclusion of damages expert on ground that his testimony was based on assumptions that were "speculative and not supported by the record"); *see also Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 382 (7th Cir.1986) (holding that even if liability had been upheld, the judgment could not be sustained because the expert's ten-year projection of lost profits bore no relation to economic reality).

**44 VVL's future lost profits would be ascertainable only by speculation; the amount of such damages, over a twenty-year period, is unprovable. No reasonable jury could award VVL future lost profits for such an arbitrarily long damages period, given the unleased status of the

Nininger property, the numerous letters suggesting that HGSI may change its position and permit mining on its properties, the instability of the vermiculite market, the increased demand for substitute products, and the entrance of new market participant; all of which suggests that the market may change dramatically over the next twenty years. Evidence that foreign vermiculite imports substantially increased since 1992, and evidence that foreign vermiculite is of higher quality than Virginia vermiculite, calls into question whether a market for *Virginia* vermiculite will exist at all in twenty years. The evidence does not show the extent of such damages as a matter of "just and reasonable inference." VVL's future lost profits damages claim being unsupportable as a matter of law, summary judgment shall be granted in favor of the defendants on this issue.

(B) TRANSPORTATION COSTS

(1) CAUSAL INJURY IN FACT

The crux of an antitrust action is individual injury in fact. *See Windham v. American Brands, Inc.*, 565 F.2d 59, 66 (4th Cir.1977); *see also Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 129 (4th Cir.1995) (noting that injury in fact is required to prove damages, and also is relevant to determine standing); M. Sean Royall, *Disaggregation of Antitrust Damages*, 65 Antitrust L.J. 311, 315 (1997) ("In order to establish the fact of injury, an antitrust plaintiff must demonstrate that it suffered 'some damage' as a causal result of the defendant's violation." (footnote omitted)). The standard is whether VVL produced sufficient proof of "*some* damage flowing from the unlawful conspiracy.... It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395

U.S. 100, 114 n. 9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) (emphasis in original).

VVL proposes two causal links to establish the defendants' conduct was a "material cause" of its transportation costs damages. First, the donation with the restrictive covenant not to mine caused VVL to incur transportation damages because the restrictive covenant prohibited the transportation of vermiculite across the M.F. Peers property. As a direct result, VVL could not transport ore across the same and had to use the road and incur transportation costs. Second, the donation with the restrictive covenant not to mine caused VVL to incur transportation damages because the donation prevented VVL from obtaining the M.F. Peers property, and but for the donation, it would have obtained the property, either because Grace voluntarily would have sold the property to VVL, or because Grace would have been required to sell the property to VVL pursuant to an antitrust duty to deal. VVL claims its inability to obtain the property thus resulted in its having to use the road and incur transportation costs.

**45 The defendants challenge these causal links, by claiming: (1) the relevant provisions of the restrictive covenant not to mine do not prevent the transportation of *598 ore across M.F. Peers if that ore was not mined from the M.F. Peers property; (2) it was not the restrictive covenant, but VVL's own lack of preparedness to transport across M.F. Peers, which was the material cause of VVL's transportation damages; (3) Grace would not voluntarily have sold to VVL; (4) Grace had no duty to deal with VVL. Bearing in mind the court's role at the summary judgment stage when the nonmoving party bears the burden of proof at trial, as VVL does regarding causation, the question is whether VVL has sufficient evidence to support its position, not whether the defendants have sufficient evidence to support their position.

The first question is whether there is a genuine dispute of material fact about whether the M.F. Peers restrictive covenant prevents the transportation of ore across the M.F. Peers property. "[O]nly an unambiguous writing justifie [s] summary judgment, and no writing is unambiguous if 'susceptible of two reasonable interpretations.' ... If there is more than one permissible inference as to intent to be drawn from the language employed, the question of the parties' actual intention is a triable issue of fact." *Atalla v. AbdulBaki*, 976 F.2d 189, 192 (4th Cir.1992) (second alteration in original) (quoting *Bear Brand Hosiery Co. v. Tights, Inc.*, 605 F.2d 723, 726 (4th Cir.1979) (quoting *American Fidelity & Casualty Co. v. London & Edinburgh Ins. Co.*, 354 F.2d 214, 216 (4th Cir.1965))); *see also Combs v. Dickenson- Wise Med. Group*, 233 Va. 177, 355 S.E.2d 553, 557 (1987) ("[W]henever it is necessary to refer to testimony of witnesses in order to ascertain the contract, or to ascertain facts in the light of which the contract is to be construed, then the court is bound to refer such controverted matters of testimony to the decision of the jury." (quoting *Camp v. Wilson*, 97 Va. 265, 33 S.E. 591, 592 (1899))). The restrictive covenant reads, in relevant part:

> 1. No part of the Real Estate shall ever be used or operated for the purpose of Mining or Mineral Production. The phrase "Mining or Mineral Production," as used herein, shall include, but shall not be limited to, the following:
>
> **46 a. The extraction, removal, or *relocation* of ores, minerals, stone, gravel and soils (including, but not limited to, vermiculite), regardless of whether or not such material is under, on or above the surface of the Real Estate.

(Pls.' S.J. Mem. Ex. 31 (emphasis added).) The defendants claim that the prohibition only applies to relocation of ore mined from the M.F. Peers property, and that this provision does not prohibit relocation (transportation) of ore across the property, as long as it is ore that already was mined from another property. In support, Grace cites handwritten notes of Mr. Sansom, who stated that Ms. Ely told him that she thought the provision only applied to ore donated by Grace. VVL responds that the restrictive covenant prohibits relocation of ore across "the surface of" the property, and does not specify whether or not that ore must have been mined from the M.F. Peers property. VVL provides evidence that no party believed that this M.F. Peers parcel contained vermiculite, calling into question the defendants' construction of the provision as applying only to M.F. Peers vermiculite. This evidence also calls into question the defendants' intent in forbidding the relocation of vermiculite ore. The clause being susceptible of two reasonable but contrary interpretations, and the intent of the contracting parties being in issue, the question is one for the jury.

The second question is whether there is a genuine dispute of material fact as to whether it was VVL's own lack of preparedness to transport across the M.F. Peers property that caused its transportation damages, and not the donation combined with the restrictive covenant not to mine. The M.F. Peers property potentially is subject to regulation and permitting requirements by the United States Army ***599** Corps of Engineers ("Army Corps"), because M.F. Peers is located in a wooded area adjacent to the South Anna River, "waters of the United States," over which the Army Corps has authority. *See* Clean Water Act of 1977 § 404, 33 U.S.C. § 1344 (West 1986 & Supp.2000); *see also* 33 C.F.R. §§ 320, 323, 328, 330 (1999). Grace argues that VVL would have had to obtain various permits to transport ore across the M.F. Peers property, or at least a release from having to obtain permits. Grace produces evidence that

VVL did not do so, or make adequate preparations to do so. Essentially, Grace's argument is that it is not "reasonably probable" that the restrictive covenant barred VVL from transporting across the property, because VVL could not have transported across M.F. Peers anyway, due to its lack of preparation. This argument does not negate the reasonable possibility that the restrictive covenant itself "materially caused" VVL's transportation damages. VVL produced evidence that it did approach the Army Corps in 1992, documents evidencing that VVL approached HGSI about its plans, expert opinions stating that its proposal might not affect the wetlands such that no permitting would be required, and evidence that a transportation system could be built so as not to require a permit.

Further, VVL's proof of causation will not fail if obtaining a permit would have been futile, such that HGSI would not have allowed VVL to transport ore across the land even if VVL had obtained a permit from the Army Corps. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 120 n. 15, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) (noting that if a plaintiff recognizes that applying for a license would be futile, failure to make a formal request for the license is not fatal to its case); *Wilder Enters., Inc. v. Allied Artists Pictures Corp.*, 632 F.2d 1135, 1142-1143 (4th Cir.1980) (holding that antitrust plaintiff who alleged that defendants caused it harm by depriving it of first-run films, may defeat argument that its own mismanagement caused its harm, due to its failure to bid for the films, by showing that bidding would have been futile); *see also Hardy v. City Optical Inc.*, 39 F.3d 765, 770 (7th Cir.1994) (holding, where plaintiff complained that defendant optometrists violated antitrust laws by not providing her with her medical records, it was no defense to assert that no obligation to do so arose absent a written request, because it would have been futile for plaintiff to make such a request). VVL produced evidence that it would have been futile to expend resources trying to

obtain a permit, and points to the plain fact that HGSI sued VVL to prevent VVL from mining Brandy B; a jury reasonably could infer that HGSI would not be amenable to VVL's transporting Brandy B ore across HGSI's property, even if VVL had a permit to do so.

**47 A jury reasonably could conclude that permitting might not have been required at all, or that the restrictive covenant deterred VVL from seeking the permit or the release from the permitting requirements, and it would have been futile to seek a permit. A genuine dispute of material fact existing as to whether VVL's injury was caused by its own lack of preparedness, summary judgment on this issue shall be denied.

The third question is whether there is a genuine dispute of material fact as to whether Grace voluntarily would have sold its M.F. Peers property to VVL.[31] VVL **600 produced a document reflecting Grace's negotiating strategy, which suggests that the amount VVL offered to Grace for the M.F. Peers property fell within the acceptable range of what Grace was willing to accept for that property. VVL offered Grace $1.75 million for the Peers', Brandy, and Nininger properties combined. VVL also produced documents stating that Grace assessed the value of VVL not obtaining these properties at $1.5 million (less than VVL's offer), that Grace was willing to accept $2.2 million (more

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31 VVL argues that Grace cannot argue that it would not have sold to VVL voluntarily had it not donated the property to HGSI, given the Fourth Circuit's statement that "even if Grace lawfully could have donated the lands to HGSI without the nonmining agreements, it is foreclosed from challenging causation simply on the basis that it could have achieved the same result through lawful means." *Virginia Vermiculite*, 156 F.3d at 540 (citing *Lee Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1302 (4th Cir.1979)). The question for the court is not what the defendants may argue at trial, but whether VVL has sufficient evidence to support its position. Therefore, the court need not interpret this statement by the Fourth Circuit at this stage of the proceedings.

than VVL's offer), and that Grace valued holding the properties, *i.e.* not donating them or selling them to anyone, at $1.1 million (less than VVL's offer). VVL argues that because holding the properties unmined was economically inferior to selling to VVL, Grace voluntarily would have sold to VVL, but for the donations. Grace argues that VVL's offer was too low, that VVL improperly compared the pre-tax value of the VVL offer to the post-tax value of the HGSI donation, and that the after-tax value of VVL's offer would have earned Grace less than the after-tax value of donating the property to HGSI. These are arguments the defendants may make to the jury; it is beyond the court's power to say with certainty what might or might not have happened had the alleged conspiracy not intervened. VVL produced specific facts from which it would be possible and reasonable to draw the inference that the property would have been sold to VVL but for the allegedly wrongful conduct of the defendants. This is sufficient to create a genuine dispute of material fact on this issue.

The fourth question is whether there is a genuine dispute of material fact about whether Grace had an antitrust duty to sell the M.F. Peers property to VVL. VVL proposes that any of three doctrines created such a duty in this case: (1) a doctrine prohibiting a competitor from buying inputs only to keep them from its rivals rather than to use them itself; (2) the essential facilities doctrine; (3) the *Aspen Skiing* duty to deal doctrine. The cases VVL cites in support of the first doctrine do not refer to any "duty to deal," but simply note that buying inputs only to keep them from rivals evidences anticompetitive behavior. *See American Tobacco Co. v. United States*, 328 U.S. 781, 803-04, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946) (affirming convictions for violations of §§ 1 and 2). Grace would fall outside such a duty, even if it existed, because it is undisputed that Grace initially purchased its Louisa County reserves with the intent to mine them, and not to keep them from VVL.

**48 The second, "essential facilities" doctrine, requires proof of market power and a relevant market, *see Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 494 & n. 11 (4th Cir.1986). The third, "*Aspen Skiing* " duty to deal, also requires proof of the relevant market. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985), the Supreme Court simply found that a monopolist of a relevant market does not have an unqualified right to refuse to deal with smaller competitors. The underlying monopolization claim required proof of the relevant market and monopoly power. *See id.* at 596, 105 S.Ct. 2847. VVL acknowledges this: "all these duties to deal would have required a showing that Grace had monopoly power in the Virginia mining rights market it was denying." (Pls.' Opp'n at 13.) As discussed *supra*, VVL has insufficient evidence, without an antitrust economics expert, to define any particular relevant market in which Grace allegedly possessed monopoly power. Further, no reasonable jury, without the aid of economic testimony, could find that Grace possesses monopoly power based on market share data alone. Typically, other factors qualify market share inferences, such as entry conditions and the ability to control price or to exclude competition. *See, e.g., Handicomp, Inc. v. U.S. Golf Ass'n*, No. 99- 5372, 2000 WL 426245, at *3 *601(3d Cir. Mar.22, 2000) ("A mere showing of substantial or even dominant market share alone cannot establish market power"); *Western Parcel Exp. v. United Parcel Service of Am., Inc.*, 190 F.3d 974, 977 (9th Cir.1999) (holding that evidence of high market share does not raise an inference of monopoly power if the market has low entry barriers or if the defendant is unable to control prices or exclude competitors). Even if VVL produces raw data concerning these other factors, the economic inferences necessary to establish actual monopoly power cannot be drawn in VVL's favor without the aid of antitrust economics testimony. Therefore, VVL cannot establish causation by arguing that it would have obtained the properties, and not suffered

damages, because Grace had a duty to deal. Summary judgment shall be granted in favor of the defendants on this issue.

To summarize, VVL produced sufficient evidence to establish that the defendants' alleged unlawful conduct caused its transportation costs damages. It can show causation by showing either that the defendants intended to prevent VVL from transporting vermiculite across the M.F. Peers property, and thus, the restrictive covenant was the material cause of the injury because it barred HGSI from allowing such transportation; or that the donation prevented VVL from obtaining that property and VVL otherwise would have obtained the property by buying it from Grace.

(2) RISK OF DUPLICATIVE RECOVERY

**49 The court having disposed of all of the Peers' antitrust law claims, there is no risk of duplicative recovery by multiple antitrust claimants. However, the Peers' state law claims essentially ask for the same damages, lost royalties. The defendants argue that if the Peers are awarded lost royalties, and VVL obtains the properties *via* the equitable relief it seeks and ultimately must pay the Peers royalties for mining, the Peers will recover two royalties for each ton of ore mined. As the court finds that the Peers cannot sustain a claim for future lost royalties, *see* Part II.E.6 *infra*, the court does not anticipate any complexity in apportioning the remedies in this case.

(3) NON-SPECULATIVE TRANSPORTATION DAMAGES

The defendants challenge the future transportation costs and alternative plant move costs as being unduly speculative, because the restrictive covenant on the M.F. Peers property has been removed, and Grace maintains that

there is no evidence that HGSI will not permit VVL to use the M.F. Peers property in the future. Given HGSI's decade-long opposition to VVL's mining practices, it is a question of fact for the jury to decide whether HGSI will prevent VVL from using HGSI's M.F. Peers property to transport its ore in the future. Further, VVL's future transportation costs claim does not suffer from the same infirmity as its future lost profits claim, because calculating the amount of future transportation damages depends on actual on-road hauling costs, not on the various highly speculative market assumptions discussed above.

(4) OTHER FACTORS

The damages alleged by a private antitrust plaintiff must be proximately caused by the alleged violation. "[T]he rule is that one who is only *incidentally* injured by a violation of the antitrust laws, the bystander who was hit but not aimed at, cannot recover against the violator." *Shapiro v. General Motors Corp.*, 472 F.Supp. 636, 643 n. 5 (D.Md.1979), *aff'd*, 636 F.2d 1214 (4th Cir.1980) (emphasis in original) (quoting *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir.1955)). As the court shall dismiss the Peers' antitrust claims, their standing no longer is in question. The defendants do not challenge VVL's relationship to the alleged antitrust violation. Therefore, this factor is satisfied.

*602The final *Associated General* requirement also is satisfied. Having found that VVL produced sufficient evidence to establish that its transportation costs damages constitute antitrust injury, and that they reasonably can be found to have been proximately caused and caused in fact by the defendants' alleged violations, the court also finds that VVL produced sufficient evidence to establish that those damages possess the necessary relationship to the forms of injury about which Congress was concerned when it created a private antitrust remedy.

**50 In summary, VVL produced sufficient evidence to recover under the Clayton Act for the transportation costs damages it allegedly suffered by reason of the defendants' actions, but not to recover for any other type of damages. On the issue of VVL's sufficiency of proof of transportation costs damages, the defendants' summary judgment motions shall be denied. As to VVL's other damages claims, summary judgment shall be granted.

2. INJUNCTIVE RELIEF (§ 16)

VVL requests "all equitable relief necessary to remedy fully the injuries to Plaintiff and to competition in the markets ... resulting from Defendants' antitrust violations, including rescinding all conveyances and assignments from Grace to HGSI of all property interests and divesting Grace of mining rights...." (Pl.'s 3d Am. Compl. at 21.)

Clayton Act § 16 differs from § 4 in that the latter requires a showing of actual injury while the former only requires a showing of threatened injury. Section 4 requires proof of injury to "business or property," while § 16 does not. (*See* note 27 *supra*). However, the Supreme Court held that "[i]t would be anomalous ... to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 112, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986). Therefore, the Supreme Court held that a plaintiff seeking injunctive relief under Clayton Act § 16 must show "a threat of antitrust injury." *Id.* at 122, 107 S.Ct. 484.

Having produced sufficient evidence to establish antitrust injury under § 4 for its claimed transportation costs and future lost profits damages, (*see* Part II.B.3.(C) *supra*), the record evidence sufficiently supports a finding of § 16 antitrust injury, as to transfers of property relating to VVL's

transportation costs and future lost profits claims, *i.e.*, the transfers of the A.D. Peers and M.F. Peers properties. The fact that VVL was unable to produce sufficient evidence as to the extent of its future lost profits damages does not bar its § 16 claims on such threatened injury, because § 16, unlike § 4, "gives any ... company ... the right to go into court and enjoin the doing of ... unlawful acts, instead of having to wait until the act is done and the business destroyed and then sue for damages." *Cargill*, 479 U.S. at 113 n. 8, 107 S.Ct. 484 (quoting the legislative history of § 16). "[T]he plaintiff need only show that there is a threat that he will suffer fact of injury and that such threatened fact of injury is causally related to the defendant's pending antitrust violation." *Paschall v. Kansas City Star Co.*, 605 F.2d 403, 408 (8th Cir.1979) (footnote omitted). VVL asserts that the defendants' alleged conspiratorial acts threaten to cause it future lost profits damages from 2012 to 2020, because VVL will deplete its Virginia reserves in 2012. VVL argues it would not run out of reserves if it possessed the Peers' properties, and that, but for Grace's donations of the Peers' properties, VVL otherwise would have obtained the properties, either because Grace voluntarily ***603** would have sold the property to VVL or because Grace would have been required to sell the property to VVL pursuant to an antitrust duty to deal. As the court indicated in its discussion of transportation costs damages, VVL produced sufficient evidence that Grace voluntarily would have sold the donated properties to VVL. This is sufficient to show that the threatened loss of future profits is causally related to the defendants' actions.

If the jury finds that the defendants conspired to monopolize vermiculite production and sales in North America, and that Grace transferred the A.D. Peers and M.F. Peers properties to HGSI pursuant to that conspiracy, the court may order whatever injunctive relief it deems necessary to correct any competitive inequities it finds,

based on the evidence presented at trial. As for the other transferred properties, including Nininger, VVL showed no relationship between their donation and any actual or threatened injury to VVL. In any event, VVL stated that it only seeks injunctive relief as to the A.D. Peers and M.F. Peers properties, and not as to the Nininger property. Although evidence of the other transfers may be used to support VVL's claim of concerted action and intent, no injunctive relief as to those properties shall be permitted.

D. HGSI AFFIRMATIVE DEFENSES

1. HGSI EXEMPTION

**51 HGSI moves for summary judgment on the ground that it is exempt or immune from antitrust liability because it is a charitable organization (its charitable status having been reaffirmed recently by the Internal Revenue Service) that did not engage in fundamentally commercial activity; because it acted at the behest of the United States government (in that the 1975 Secretary of the Interior and the National Park Service encouraged Grace's donations to HGSI); and because the application of the Sherman Act in this case is inconsistent with National Environmental Policy Act ("NEPA"), *see* 42 U.S.C.A. § 4321 (West 1994 & Supp.2000), and the National Historic Preservation Act ("NHPA"), *see* 16 U.S.C.A. § 470 (West 1985 & Supp.2000), which protect the Landmark and provide that all laws of the United States shall be construed "in accordance with the policies set forth in [NEPA]." 42 U.S.C. § 4332(1) (West 1994). VVL cross-moves for summary judgment on these issues.

Nonprofit organizations are not exempt from the Sherman Act based on the nature of their organization. *See Virginia Vermiculite,* 156 F.3d at 540; *see also Goldfarb v. Virginia State Bar,* 421 U.S. 773, 787, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (holding that "there is a heavy presumption against implicit exemptions" to antitrust law). Congress has

not granted immunity to preservation organizations whose actions may violate the Sherman Act. Therefore, the court shall grant the plaintiffs' motion for summary judgment on HGSI's Third Affirmative Defense, claiming exemption on the basis that its actions are immune from liability because it acted at the behest of the government.

Regardless of any exemption status, the Fourth Circuit found that HGSI is subject to liability in this case because the transactions at issue were "essentially commercial." To support this proposition, the court of appeals found: (1) "the transaction between HGSI and Grace had obvious effects on the commercial market for vermiculite: by constraining the supply of vermiculite, the transaction increased the price of the mineral," *Virginia Vermiculite*, 156 F.3d at 541; and (2) "the transaction had direct commercial benefits for HGSI itself: by receiving hundreds of acres of land, HGSI not only realized a substantial 'pecuniary gain,' but also protected the alleged commercial interests of its management and members, which might be affected by mining of the land." *Id.*(citation omitted). HGSI argues that the Fourth Circuit's findings accepted all the allegations of the complaint as true, as the case was on appeal from this court's order dismissing various claims pursuant to Federal Rule of Civil Procedure 12(b)(6), and that, discovery having concluded, the undisputed evidence reveals that the transaction was not fundamentally commercial. HGSI correctly observes ***604** that the plaintiffs did not produce sufficient evidence that the transactions increased the price of vermiculite. (*See* note 28 *supra.*) However, the record evidence supports the second finding. Grace documents show that the value of the donated land itself, independent of the mining rights, was $721,000. "[B]y receiving hundreds of acres of land, HGSI ... realized a substantial 'pecuniary gain,'...." *Id.* The evidence also is undisputed that HGSI sold some of the donated

parcels for pecuniary gain. This is sufficient to show the transaction was commercial in nature.

Even if the transaction was not commercial in nature, the Fourth Circuit held, "an organization that would otherwise be exempt from the antitrust laws loses its exemption by conspiring with a nonexempt party." *Id.* at 541. As discussed *supra,* VVL produced sufficient evidence that HGSI conspired with Grace in violation of § 2. Consequently, HGSI's motion for summary judgment on its exemption or immunity status on any ground, including its argument based on NEPA and NHPA, shall be denied. The plaintiffs' motion on these issues shall be granted.

2. FIRST AMENDMENT DEFENSE

**52 Both VVL and HGSI move for summary judgment on HGSI's First Amendment affirmative defense. As noted above, the *Noerr-Pennington* doctrine is based on the First Amendment. *See California Motor Trans. Co. v. Trucking Unlimited,* 404 U.S. 508, 510-11, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). Having found that HGSI's actions with respect to VVL's Brandy B property--*i.e.* petitioning the permit board and filing the *Brandy* lawsuit--are immune from antitrust liability under the *Noerr-Pennington* doctrine, summary judgment must be granted in HGSI's favor on its First Amendment affirmative defense, but only insofar as that defense is based on *Noerr-Pennington* with respect to the allegations described in Part II.A.1.(A)(3) *supra.*

HGSI's other ground for First Amendment protection, based on rights recognized in *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), is without merit. As the Fourth Circuit previously found, and as described *supra,* HGSI was financially interested in its transactions with Grace, which removes those transactions from any First Amendment

protection. *See Virginia Vermiculite,* 156 F.3d at 541 n. 2. Further, the HGSI-Grace donations were the means by which HGSI claims it intended to further the preservation cause, and as such, are not protected by *the Noerr-Pennington* doctrine. *See Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 425, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990) (distinguishing between restraints that are the intended *consequence* of government action, which are protected, and restraints that are the *means* by which the defendants sought to obtain favorable government action, which are not protected). The court shall grant the plaintiffs' summary judgment motion as to HGSI's First Amendment defense, but only insofar as that defense is based on conduct other than HGSI's petitioning of the permit board with respect to Brandy B and its pursuit of the *Brandy* litigation.

3. SLAPP SUIT DEFENSE

VVL moves for summary judgment that its lawsuit is not a "strategic lawsuit against public participation" ("SLAPP" suit), as alleged by HGSI in its Fifth Affirmative Defense. The only case HGSI cites in support of such a doctrine, *Oregon Natural Resources Council v. Mohla,* 944 F.2d 531, 533 (9th Cir.1991), discusses only the *Noerr-Pennington* doctrine in the context of "heightened pleading" requirements for antitrust plaintiffs who bring antitrust claims against persons who have petitioned the government. The motion to dismiss stage having past, the SLAPP suit defense appearing indistinguishable from HGSI's First Amendment *Noerr-Pennington* defense, and having found no court in ***605** Virginia or in the Fourth Circuit that recognizes the "SLAPP" suit defense, the court shall grant the plaintiffs' motion for summary judgment on this issue.

4. LACHES AND UNCLEAN HANDS

HGSI moves for summary judgment on the bases of laches and unclean hands. VVL filed its original suit in 1995, little over one year after the 1994 A.D. Peers donation. A one-year delay is insufficient to constitute laches. HGSI's motion shall be denied on this issue.

HGSI's only evidence of unclean hands are lobbying efforts by VVL to have vermiculite treated as an essential mineral, and to seek delisting of the Landmark on the grounds of despoliation. As HGSI bears the burden of proof at trial on unclean hands, its evidence must demonstrate the absence of a genuine issue of fact that VVL has unclean hands, and it must be sufficient to warrant a directed verdict in HGSI's favor if not controverted at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 331, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). HGSI's evidence is insufficient to sustain that initial burden, and its motion shall be denied on this issue.

E. STATE LAW CLAIMS

1. VIRGINIA ANTITRUST ACT

The Virginia Antitrust Act prohibits "[e]very contract, combination or conspiracy in restraint of trade or commerce," Va.Code Ann. § 59.1-9.5 (Michie 1998), and "[e]very conspiracy combination, or attempt to monopolize, or monopolization of, trade or commerce." *Id.* § 59.1-9.6. The plaintiffs' claims under the Virginia Antitrust Act are governed by the same standard as their claims under the Sherman Antitrust Act. *See Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Va., Inc.*, 714 F.2d 351, 358 n. 13 (4th Cir.1983). For the reasons discussed in Parts II.A-B *supra*, summary judgment shall be granted in favor of the defendants on the plaintiffs' claims under the Virginia Antitrust Act, except as to VVL's claim for conspiracy to monopolize pursuant to § 59.1-9.6.

2. VIRGINIA CONSPIRACY ACT

63 Both sides move for summary judgment as to VVL's Virginia Conspiracy Act claim. Section 18.2-499 of the Virginia Code subjects to criminal liability any two persons who "combine, associate, agree, mutually undertake or concert together for the purpose of ... willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever." Va.Code Ann. § 18.2-499 (Michie 1996). Civil liability may be established for such conduct pursuant to section 18.2-500 of the Virginia Code. *See id.* § 18.2-500 (Michie 1996 & Supp.1999). The Virginia Supreme Court recently held that these sections "do not require a plaintiff to prove that a conspirator's primary and overriding purpose is to injure another in his trade or business.... Rather, ... these statutes merely require proof of legal malice, that is, proof that the defendant acted intentionally, purposefully, and without lawful justification." *Advanced Marine Enters., Inc. v. PRC Inc.*, 256 Va. 106, 501 S.E.2d 148, 154-55 (1998). The statute "does not require that the *co-conspirator* act with legal malice. Rather, the statute simply requires that one party, acting with legal malice, conspire with another party to injure the plaintiff." *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522, 527 (4th Cir.1997) (emphasis added). This court previously found that "without lawful justification" means that the defendants "contrived to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." *Carpenter v. Drechsler*, Civ. A. No. 89-0066-H, 1991 WL 332766, at *8 (W.D.Va. May 7, 1991) (citations omitted), *aff'd mem.*, 19 F.3d 1428 (4th Cir.1994); *see* ***606 *also Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 337 S.E.2d 744, 748 (1985) ("[A]n allegation of conspiracy ... must at least allege an unlawful act or an unlawful purpose.").

Both sides' motions for summary judgment shall be denied on this issue. VVL's evidence that the defendants acted in concert to drive it out of business in furtherance of a conspiracy to monopolize, discussed in Parts II.A.1 and II.B.3 *supra,* is sufficient to satisfy its burden as to its Virginia Conspiracy Act claim. The defendants' evidence that HGSI long opposed Grace's mining practices, and that HGSI's Ms. Ely was unaware that Grace harbored any motivation besides capitulating to that opposition, is sufficient to create a genuine dispute of material fact on the issue of concerted action. The defendants also produced evidence that Grace originally offered the properties to VVL, and that Grace donated the properties to HGSI in order to "get this lady [Ms. Ely] satisfied and off our backs," (Kohnken Dep. at 42), and to "avoid the future [carrying] expenses, get the maximum tax benefit possible, and get the favorable P.R. value." (Grace S.J. Mem. Ex. 12). This satisfies the defendants' burden of setting forth specific facts showing that their purpose in entering into the transactions is a genuine issue for trial. *See* Fed.R.Civ.P. 56(e). Therefore, both sides' motions for summary judgment shall be denied on this claim.

3. A.D. PEERS'S RELEASE OF ALL CLAIMS

**54 Grace argues that A.D. Peers released all of his claims against Grace when he bought back Parcel A. The release allegedly includes all of A.D. Peers's antitrust claims, and all of his state law claims for contractual breaches, waste, and conversion.

Under Virginia contract law, "when considering the meaning of any part of a contract, ... [courts must] construe the contract as a whole." *Lansdowne Dev. Co., L.L.C. v. Xerox Realty Corp.*, 257 Va. 392, 514 S.E.2d 157, 161 (1999). *See also Santos v. Santos,* No. 2712-98-4, 2000 WL 251663, at *1 (Va.Ct.App. Mar.7, 2000) ("The applicable rules of

construction require [courts] to construe all provisions of the contract together and to determine the meaning in this fashion where possible."). On December 27, 1973, A.D. Peers executed a deed conveying his property to Grace, including Parcel A (containing 36.62 acres), and Parcel B (containing 228.99 acres). A.D. Peers lived on Parcel A. That same day, A.D. Peers and Grace entered into an unrecordered agreement (the "1973 agreement"), which set forth the rights and responsibilities of the parties. For example, the 1973 agreement contained a royalties provision, whereby Grace would pay A.D. Peers one dollar per ton of vermiculite mined, or a rate no less than the rate Grace paid others in the Louisa County area, in the event that Grace decided to mine. Although Grace retained sole discretion to decide whether to mine, the 1973 agreement contained detailed provisions about when royalty payments were to be made, what statements Grace was required to give A.D. Peers, including what quantity and type of ore was removed, and what procedure A.D. Peers could follow to inspect Grace's records. Under the 1973 Agreement, A.D. Peers also retained the right to occupy the premises until Grace notified A.D. Peers of its intent to resell or to mine the property, at which time A.D. Peers could continue to occupy the premises until the date of closing of the resale, or for one year after Grace provided its notice of intent to mine. The 1973 Agreement also contained a provision stating that, for thirty days after Grace's notice of intent to resell the property, A.D. Peers would have the option of buying back Parcel A.

Grace gave A.D. Peers notice of its intention to donate the A.D. Peers properties to HGSI on December 18, 1993. Pursuant to the 1973 agreement, A.D. Peers chose to exercise his right to buy back *607 Parcel A. By deed dated January 25, 1973 (the "January 25 agreement"), Grace conveyed Parcel A back to A.D. Peers. The January 25 agreement described in detail the subject of that agreement:

"All that certain tract or parcel of land in the Green Springs Magisterial District of Louisa County, Virginia, fronting on State Route 22, containing 36.62 acres, more or less, as identified as Parcel 'A' on plat of Hart & Bell.... Being a part of the same real estate conveyed to W.R. Grace & Co .... by deed dated December 27, 1973...." (Grace S.J. Mem. Ex. 16.) The January 25 agreement also provided:

> **55 This conveyance is also made pursuant to the terms of a certain unrecorded agreement dated December 27, 1973, between W.R. Grace & Co. and Alfred D. Peers and Elizabeth D. Peers, his wife (the "Agreement"). Alfred D. Peers and Elizabeth D. Peers join in this Deed to acknowledge that Grantor has fulfilled its responsibilities under the Agreement and to release for themselves and their heirs ... any further interest, rights, claims, or privileges under the Agreement.

(Grace S.J. Mem. Ex. 16 at 2.) The parties signed the January 25 agreement under seal.

Six days later, Grace transferred Parcel B to HGSI by quit claim deed of gift, dated January 31, 1994 (the "January 31 agreement"). That agreement provided: "This conveyance is also made subject to the terms of a certain unrecorded agreement dated December 27, 1973, between W.R. Grace & Co. and Alfred D. Peers and Elizabeth D. Peers, his wife." (Pls.' S.J. Mem. Ex. 38 at 2.)

Grace argues that the January 25 agreement unambiguously releases "all claims" A.D. Peers had under the 1973 agreement, that the 1973 agreement applies both to Parcel A and to Parcel B, and that, therefore, A.D. Peers released all rights and claims he had against Grace for donating Parcel B, including the rights he had under the

1973 provisions requiring Grace to pay mining royalties for Parcel B. The plaintiffs respond that the release cannot be divorced from its context: when on January 25 A.D. Peers released "all claims" he had under the 1973 agreement, he only released "all claims" that related to the subject matter of the agreement in which the release was made, *i.e.* the January 25 agreement, the express subject matter of which was Parcel A. Therefore, the plaintiffs argue, A.D. Peers only released the claims he had concerning, for example, his right to buy back Parcel A and his right to royalties for the mining of Parcel A. Under the 1973 agreement, A.D. Peers had at least two rights: the right to buy back Parcel A, and the right to royalties for Parcel B. The plaintiffs argue that it would not make sense for A.D. Peers to relinquish one right in order to exercise the other, especially since the remaining and allegedly relinquished right was to obtain royalties for the mining of a parcel that constituted 86% of all the land originally transferred under the 1973 agreement. The plaintiffs argue further that the provision in the January 31 Parcel B agreement, making HGSI subject to the terms of the 1973 agreement, indicates that Grace still had responsibilities, and A.D. Peers still had rights, concerning Parcel B.

In considering the meaning of the release contained in the January 25 agreement, the court must construe that agreement "as a whole." *Lansdowne Dev.*, 514 S.E.2d at 161. Doing so, the court agrees with the plaintiffs' argument. The release contained in the January 25 agreement must be read in light of--not independent of--the subject matter of the January 25 agreement, which pertained only to Parcel A. Accordingly, the court finds that A.D. Peers did not release "all claims" against Grace pertaining to Parcel B. The defendants' motion for summary judgment shall be denied on this issue.

4. BREACH OF CONTRACTUAL DUTY OF GOOD FAITH

**56 Virginia contract law recognizes a cause of action for failure to exercise contractual *608 discretion in good faith. *See Historic Green Springs, Inc. v. Brandy Farm, Ltd.*, 32 Va. Cir. 98, 102-03 (1993) (holding that Grace breached its good faith duty to the owner of the Brandy properties by transferring Brandy A to HGSI); *Virginia Vermiculite*, 156 F.3d at 542 ("it is a basic principle of contract law in Virginia ... that although the duty of good faith does not prevent a party from exercising its explicit contractual *rights*, a party may not exercise contractual *discretion* in bad faith, even when such discretion is vested solely in that party." (emphasis in original)). Grace had discretion whether to mine the Peers' properties under the contracts that provided for mining royalties if mining took place. The plaintiffs argue that they are entitled to summary judgment that Grace's donation of the A.D. Peers and M.F. Peers properties to an organization that has conducted a twenty-year campaign against the mining of vermiculite in Louisa County breached Grace's duty to exercise its contractual discretion in good faith.

The parties dispute whether proof of bad intent is required under the good faith doctrine. Grace argues that it must have intended to harm the Peers in order to be liable for breaching its duty of good faith, and that its intent is a disputed issue of material fact. The plaintiffs argue that intent is not required under Virginia law as expressed in the *Brandy* court's decision, and that a party can be strictly liable for breaching the good faith duty if its actions objectively violate the parties' reasonable expectations.

It is clear that the Virginia Supreme Court does not consider the question of bad faith as a strict liability question; it consistently has discussed bad faith in terms of

the defendant's intent. The supreme court established the standard for assessing common law contract breach of good faith claims in *State Farm Mutual Automobile Insurance Company v. Floyd*, 235 Va. 136, 366 S.E.2d 93, 97 (1988): "[T]o ... establish[ ] 'bad faith' on the part of contracting parties who are merely under the obligation to exercise good faith in the conduct of a business relationship .... [the plaintiff] is required to show that the [defendant] acted in furtherance of its own interest, with intentional disregard of the financial interest of the [plaintiff]." *Id.* at 97; *cf. Nationwide Mut. Ins. Co. v. St. John*, 259 Va. 71, 524 S.E.2d 649, 651 (2000) (noting that "the action in *Floyd* was a common law breach of contract action"). *See also Chesapeake Builders, Inc. v. Lee*, 254 Va. 294, 492 S.E.2d 141, 144 (1997) (holding that purchaser of real property was not entitled to recover damages for the loss of his bargain as a result of the sellers' breach of contract, where the evidence showed the sellers "did not act in bad faith or intentionally misrepresent" that they owned the real estate they purported to sell); *Charles E. Brauer Co. v. NationsBank of Virginia, N.A.*, 251 Va. 28, 466 S.E.2d 382, 386 (1996) (observing that the U.C.C. duty of good faith requires a showing of dishonesty, not just arbitrary action).

To the extent the *Brandy* court did not consider Grace's intent, it is inconsistent with the principles of law enunciated by the Virginia Supreme Court; in such a case, this court declines to follow the *Brandy* court. To the extent the *Brandy* court did consider Grace's intent, its findings of fact were made following a bench trial and testimony by witnesses; in such a case, the issue would arise under the collateral estoppel doctrine, an argument the plaintiffs failed to raise. Although Grace's donation of the Peers' properties to an organization that opposes mining is strong evidence in the plaintiffs' favor on this claim, Grace produced evidence that it did not believe the M.F. Peers property contained commercially viable vermiculite, and that its intention was

to preserve the Landmark, gain good will in the community, and receive a substantial tax benefit. The letters discussed *supra,* indicating HGSI's intent to mine, also support Grace on this claim. If Grace believed HGSI *609 would mine the properties, a reasonable jury could find that it did not breach its duty to exercise its contractual discretion in good faith by donating the properties to HGSI. The question of Grace's intent is a factual question that must be heard and resolved by the trier of fact. Therefore, the plaintiffs' motion for summary judgment on this issue shall be denied.

5. UNJUST ENRICHMENT

**57 The court previously dismissed the plaintiffs' claims for unjust enrichment under Virginia law. *See Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.,* 965 F.Supp. 802, 829-31 (W.D.Va.1997), *overruled on other grounds,* 156 F.3d 535 (4th Cir.1998). The plaintiffs did not appeal that ruling. Accordingly, it remains the law of the case, and is binding on the plaintiffs. *See Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.,* 810 F.2d 243, 250 (D.C.Cir.1987) ("Under law of the case doctrine, a legal decision made at one state of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time."). The defendants' summary judgment motions shall be granted on this issue.

6. LOST ROYALTY DAMAGES

The Peers claim lost royalties from 1995 to 2025. The future lost royalties span a twenty-five-year time period, even longer than VVL's future lost profits claim. For the reasons discussed in Part II.C.1.(A) *supra,* these future lost royalties are so speculative that no reasonable jury could

award them. Summary judgment shall be awarded in the defendants' favor on the Peers' future lost royalties claims.

The Peers' past lost royalties (from 1995 to 2000) are based on the following causal chain. If Grace had not wrongfully donated the properties to HGSI, (1) Grace would have sold the properties to VVL, (2) VVL would have mined both A.D. Peers's and M.F. Peers's properties simultaneously with its mining of the Brandy properties, and (3) VVL would have paid the Peers a royalty rate equivalent to what it pays others in Louisa County. Grace challenges the first and second propositions. As discussed in Part II.C.1.(B)(1) *supra,* the plaintiffs produced sufficient evidence that Grace voluntarily would have sold the properties to VVL had it not donated them to HGSI. With regard to the second proposition, Grace argues that VVL's own witnesses testified that "the likely progression" would be to mine only one property at a time. (Grace S.J. Mem. at 81 n. 70.) These are genuine disputes of material fact. Therefore, the defendants' motions for summary judgment on the Peers' past lost royalties claims shall be denied.

III.

**58 To summarize, the plaintiffs' motion for partial summary judgment shall be granted in part, as to: (1) HGSI's Third Affirmative Defense (exemption and immunity); (2) HGSI's Fourth Affirmative Defense (First Amendment), except as to *Noerr-Pennington* issues; (3) HGSI's Fifth Affirmative Defense ("SLAPP suit"). In all other respects, the plaintiffs' motion shall be denied.

The defendants' motions shall be granted in part, as to: (1) the plaintiffs' Sherman Act § 1 claims and the corresponding claims under the Virginia Antitrust Act; (2) the plaintiffs' Sherman Act § 2 monopolization claims and the corresponding claims under the Virginia Antitrust Act; and (3) the plaintiffs' Sherman Act § 2 attempted

monopolization claims and the corresponding claims under the Virginia Antitrust Act; (4) past and future lost profits under the Clayton Act; (5) Grace's not having an antitrust duty to deal with VVL; (6) HGSI's Fourth Affirmative Defense (First Amendment), but only as to *Noerr-Pennington* issues; (7) the Peers' ***610** unjust enrichment claims; and (8) the Peers' future lost royalties claims. In all other respects, the defendants' motions shall be denied.

Genuine disputes of material fact remain as to the following issues. (1) VVL's federal and state conspiracy to monopolize claims, including disputed questions of fact concerning: (a) concerted action between the defendants; (b) the defendants' specific intent, meaning unity of purpose, or common design and understanding, that their alleged agreement result in Grace's monopolization of a part of interstate commerce by exclusion of Grace's only domestic competitor; (c) commission of overt acts by the defendants in furtherance of the alleged conspiracy; (d) antitrust injury, as to past and future transportation damages, plant move damages, and future lost profits; (e) causation in fact of past and future transportation damages and plant move damages, specifically as to (*i*) the defendants' intent in imposing the M.F. Peers restrictive covenant; (*ii*) whether VVL's lack of preparedness caused its transportation damages; (*iii*) whether seeking a permit would have been futile; (*iv*) whether Grace voluntarily would have sold to VVL but for the donations; (*v*) whether the recent release of all restrictive covenants eliminates any future injury; (f) amount of damages; (g) injunctive relief, as to (*i*) whether the defendants' acts threatened VVL with future lost profits; (*ii*) a causal connection between the defendants' acts and threatened future lost profits. (2) VVL's Virginia Conspiracy Act claim, including disputed questions of fact concerning: (a) whether the defendants mutually undertook to harm or injure VVL's business; (b) with legal malice (specifically, whether the defendants acted intentionally, purposefully,

and without lawful justification). (3) The Peers' claims that Grace breached its implicit duty to exercise contractual discretion in good faith, including disputed questions of fact concerning Grace's intent, specifically as to whether Grace acted in furtherance of its own interest and intentionally disregarded the Peers' financial interests. (4) The Peers' state law claims for express breach of contract, waste, and conversion. (5) The Peers' claims for past lost royalties, specifically concerning causation: (a) whether Grace voluntarily would have sold the properties to VVL but for the transactions with HGSI; (b) whether VVL would have mined both of the Peers' properties simultaneously, during the alleged period of injury; and (c) what royalties VVL would have paid the Peers.

An appropriate Order shall this day issue.

ORDER

**59 Upon consideration of: (1) the plaintiffs' motion for partial summary judgment (originally filed December 22, 1999, redacted version filed May 10, 2000), the oppositions thereto, and the replies thereto; and (2) defendant W.R. Grace & Co.-Conn.'s motion for summary judgment (originally filed December 22, 1999, redacted version filed May 22, 2000), the opposition thereto, and the replies thereto; and (3) defendant The Historic Green Springs, Inc.'s ("HGSI") motion for summary judgment (originally filed December 22, 1999, redacted version filed May 25, 2000), the opposition thereto, and the replies thereto; and (4) all of the exhibits accompanying each of the parties' briefs; and (5) all parties' statements of material facts, the oppositions thereto, and the replies thereto; and having heard oral argument of counsel; and for the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

as follows:

1. The plaintiffs' motion for partial summary judgment shall be GRANTED IN PART, as to: (a) HGSI's Third Affirmative Defense (exemption and immunity); (b) HGSI's Fourth Affirmative Defense (First Amendment), except as to *Noer-**611 *Pennington* issues; and (c) HGSI's Fifth Affirmative Defense ("SLAPP suit").

2. In all other respects, the plaintiffs' motion for partial summary judgment shall be DENIED.

3. The defendants' motions for summary judgment shall be GRANTED IN PART, as to: (a) the plaintiffs' Sherman Act § 1 claims and the corresponding claims under the Virginia Antitrust Act; (b) the plaintiffs' Sherman Act § 2 monopolization claims and the corresponding claims under the Virginia Antitrust Act; (c) the plaintiffs' Sherman Act § 2 attempted monopolization claims and the corresponding claims under the Virginia Antitrust Act; (d) the plaintiffs' past and future lost profits claims under the Clayton Act; (e) Grace's antitrust duty to deal with VVL; (f) HGSI's Fourth Affirmative Defense (First Amendment), but only as to *Noerr-Pennington* issues; (g) the Peers' unjust enrichment claims; and (h) the Peers' future lost royalties claims.

4. In all other respects, the defendants' motions for summary judgment shall be DENIED.

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VIRGINIA VERMICULITE, LIMITED,
Plaintiff-Appellant,

and

M.F. PEERS, JR.; NORMA PEERS,
Plaintiffs,

v. **No. 97-1698**

W.R. GRACE & COMPANY - CONNECTICUT,
Defendant-Appellee.

M.F. PEERS, JR.; NORMA PEERS;
VIRGINIA VERMICULITE, LIMITED,
Plaintiffs-Appellants,

v. **No. 97-1699**

W.R. GRACE & COMPANY - CONNECTICUT,
Defendant-Appellee.

VIRGINIA VERMICULITE, LIMITED,
Plaintiff-Appellant,

v. **No. 97-1807**

W.R. GRACE & COMPANY - CONNECTICUT;
THE HISTORIC GREEN SPRINGS, INCORPORATED,
Defendants-Appellees.

NATIONAL TRUST FOR HISTORIC PRESERVATION;
THE LAND TRUST ALLIANCE,
Amici Curiae.

Appeals from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Senior District Judge. (CA-96-12-3-C, CA-96-13-3-C, CA-95-15-3-C)

Argued: December 4, 1997
Decided: September 1, 1998
[Entered: September 1, 1998]

Before LUTTIG and WILLIAMS, Circuit Judges, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.*

Reversed and remanded by published opinion. Judge Luttig wrote the opinion, in which Judge Williams joined.

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*Senior Judge Merhige participated in the hearing of this case at oral argument but retired before the decision was filed. The decision is filed by a quorum of the panel. See 42 U.S.C.§ 46(a).

COUNSEL

ARGUED: Einer Richard Elhauge, HARVARD LAW SCHOOL, Cambridge, Massachusetts, for Appellants. Charles Hubert Montange, Seattle, Washington; Randolph S. Sherman, KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, New York, New York, for Appellees. **ON BRIEF:** David Z. Izakowitz, Jane Champion Clarke, WOODS, ROGERS & HAZLEGROVE, P.L.C., Charlottesville, Virginia, for Appellant Virginia Vermiculite; Roger S. Martin, MARTIN & WOODARD, P.L.C., Charlottesville, Virginia, for Appellants Peers. David S. Copeland, KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, New York, New York; Thomas E. Albro, Patricia D. McGraw, TREMBLAY & SMITH, Charlottesville, Virginia, for Appellee W.R. Grace.

OPINION

LUTTIG, Circuit Judge:

Plaintiffs Virginia Vermiculite, Limited and M.F. Peers, Jr. and Norma Peers appeal from the district court's dismissal of their claims against defendants W.R. Grace & Company and Historic Green Springs, Incorporated, brought under section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Virginia law. Reviewing the district court's dismissal de novo, Chisolm v. TranSouth Financial Corp., 95 F.3d 331, 334 (4th Cir. 1996), we reverse.

I.

Appellant Virginia Vermiculite, Limited ("VVL") and appellee W.R. Grace & Company ("Grace") are the only domestic producers of vermiculite, a unique mineral used in fire safety, energy conservation, construction, environmental protection, food processing, and horticulture. Appellee Historic Green Springs, Incorporated ("HGSI") is a nonprofit organization that seeks to protect the Green Springs National Historic Landmark District in western Virginia. For approximately twenty years, HGSI has conducted a campaign to prevent vermiculite mining in the Green Springs region. Appellants Peerses are family members who sold land containing vermiculite deposits to Grace, subject to royalty agreements.

Vermiculite is a relatively rare mineral. Only two states, South Carolina and Virginia, have known and usable vermiculite reserves. Grace mines vermiculite only in South Carolina; VVL, only in Virginia. Until 1976, Grace was the sole producer of vermiculite in the United States. From 1972 to 1976, Grace purchased mining rights to over 80% of the known vermiculite deposits in Virginia. Grace acquired some of this land from members of the Peers family, including appellants Peerses, in return for a lump sum and royalties on any vermiculite mined from the land. In

exchange for these royalties, the Peerses agreed in writing that Grace, and its successors in interest, would retain "sole discretion" over whether to mine the land. Grace, however, never mined any of its Virginia deposits and consequently did not pay the Peerses any royalties.

In 1976, VVL entered the vermiculite market by obtaining rights to one of the few Virginia deposits not already held by Grace. By the early 1990s, VVL's share of the domestic vermiculite market had grown to approximately 23%. Grace, however, owned more than 80%of the mining rights to known vermiculite deposits in the United States, while VVL was rapidly depleting the deposits to which it had access.

In 1991, Grace invited VVL to make an offer to purchase Grace's vermiculite holdings in Virginia. VVL duly made an offer, which was rejected by Grace. Grace thereafter donated its holdings to HGSI. These holdings, comprising over 40% of the known vermiculite deposits in the United States, covered almost 1400 acres of land located in and around the Green Springs region. VVL alleges that the purpose of the donation was to prevent VVL from obtaining access to the vermiculite deposits on the land.

Grace made its donation in two parts. In 1992, Grace conveyed 1152 acres to HGSI, accompanied with restrictive covenants barring vermiculite mining on the land. Although the covenants bound HGSI and its successors in interest, Grace retained the right to waive them. However, a Virginia court subsequently struck down one of these covenants. See HGSI v. Brandy Farm, Ltd., 32 Va. Cir. 98, 102-03 (Louisa Cty. 1993), petition refused, No. CH-4872 (Va. June 20, 1994). Consequently, when Grace transferred the final 229 acres to HGSI in 1994, it omitted any similar covenants. VVL alleges, however, that Grace executed this second part of the donation on the unwritten understanding that HGSI would not allow vermiculite mining on the land.

As a result of this donation, on February 21, 1995, VVL brought suit against Grace and HGSI ("the VVL suit"). VVL's complaint included six counts. Count I alleged that Grace and HGSI entered into an agreement, combination, or conspiracy in restraint of trade in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Count II alleged that Grace engaged in monopolization in violation of section 2 of the Sherman Act, id. § 2. Count III alleged that Grace attempted to engage in monopolization, also in violation of section 2. Count IV alleged that Grace and HGSI entered into a conspiracy to monopolize, again in violation of section 2. Count V alleged that Grace and HGSI violated analogous provisions of the Virginia Anti-trust Act, Va. Code §§ 59.1-9.1 to 59.1-9.18. Count VI alleged that Grace and HGSI engaged in a conspiracy to injure another in trade, business, or profession, in violation of Virginia law, id. § 18.2-499.

On March 12, 1996, VVL, which had obtained interests in the claims of various members of the Peers family, and appellants Peerses brought two additional lawsuits against Grace ("the Peers suits"). The two suits included essentially identical counts. Counts I to V alleged that Grace's donation of the land sold to it by the Peerses violated various state laws. Count VI alleged that the donation violated section 1 of the Sherman Act.

The district court referred all of these suits to a magistrate judge, and, on September 19, 1995, the magistrate recommended dismissing Counts I, II, and III of the VVL suit for failure to state a claim, Fed. R. Civ. P. 12(b)(6), and dismissing Counts V and VI for want of jurisdiction, 28 U.S.C. § 1367(c). On September 19, 1996, the magistrate recommended dismissing the Peers suits in their entirety on similar grounds.

The district court adopted the magistrate's recommendations in part. 965 F. Supp. 802 (W.D. Va. 1997). First, the district court concluded that VVL and the Peerses had failed to state a claim for an agreement, combination, or conspiracy in restraint of trade under section 1 of the Sherman Act. Id. at 819-21. Consequently, it dismissed Count I of the VVL suit, Count V of the same suit to the extent that it relied on the same theory, and Count VI of the Peers suits. Id. at 821. Second, the district court held that HGSI was entitled to an exemption from the antitrust laws. Id. at 813. It thus dismissed HGSI from the VVL suit entirely. Id. at 818. Third, the district court concluded that VVL and the Peerses had failed to state a claim under Virginia law in the Peers suits. Id. at 829-32. Therefore, it dismissed the remainder of those suits. Id. VVL and the Peerses subsequently brought this consolidated appeal, challenging all three rulings.

II.

Appellants first assert that the district court erred in finding that they failed to state a claim under section 1 of the Sherman Act. We agree.

The district court dismissed appellants' section 1 claims on the ground that appellants failed to demonstrate a sufficient causal relationship between their alleged injury and appellees' alleged violation of the antitrust laws. 965 F. Supp. at 819. Specifically, the court reasoned that any injury to appellants was unavoidable because HGSI, or its successors in interest, would not have allowed vermiculite mining on the donated lands even absent the nonmining agreements between HGSI and Grace. Id. at 820. This reasoning is faulty for two reasons.

First, appellants sufficiently alleged that HGSI, or its successors in interest, might eventually have allowed vermiculite mining on the donated lands in the absence of the nonmining agreements. In this regard, of course,

appellants need only make a "colorable" showing that it was "reasonably probable" that the behavior in question caused their injury. Advanced Health-Care Servs., Inc. v. Radford Community Hosp., 910 F.2d 139, 149 (4th Cir. 1990). Such a low standard is particularly justified in this context because"in antitrust cases, where `the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." Hospital Bldg. Co. v. Trustees of the Rex Hosp., 425 U.S. 738, 746 (1976) (quoting Poller v. CBS, 368 U.S. 464, 473 (1962)) (citation omitted).

Appellants meet this standard. VVL acknowledged in its complaint that eliminating vermiculite mining was "one of HGSI's avowed goals." J.A. at 575. It also claimed, however, both that HGSI had other goals and that its management and members had financial interests of their own in the land in question. Id . By alleging that HGSI had goals beyond eliminating vermiculite mining and that its management and members individually had financial interests in the land in question, appellants sufficiently raised the specter either of possible mining by HGSI or its agents or of sale of the land to another for mining. As appellants observe, it is not at all implausible that HGSI might have chosen to mine the reserves in order to pursue other of its goals or even to preserve its financial stability. Indeed, appellants represent that HGSI has already sold some of the land. See Br. of Appellants at 40. The fact that the parties saw the need to enter into the nonmining agreements at all yet further supports the inference that HGSI had other goals beyond preservation, as the nonmining agreements would have been superfluous to the donation were HGSI committed solely to the elimination of mining.

Second, the district court simply misconstrued the nature of appellants' section 1 allegations. Rather than asserting that the nonmining agreements alone constituted an agreement, combination, or conspiracy in violation of

section 1, both VVL and the Peerses alleged that the entire transaction between Grace and HGSI -- comprising both the donation of the lands and the nonmining agreements -- constituted such an agreement, combination, or conspiracy. See J.A. at 575-76 (VVL complaint); id. at 129, 141 (Peers complaints). Consequently, the relevant question for causal purposes is not whether HGSI would have allowed mining in the absence of the nonmining agreements, but rather whether Grace would have allowed mining in the absence of both the donation and the nonmining agreements. Absent its transaction with HGSI, Grace may even have been required to grant VVL access to its Virginia holdings, on the ground that failure to do so would constitute an improper unilateral refusal to deal. See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 n.32 (1992). Further, even if Grace lawfully could have donated the lands to HGSI without the nonmining agreements, it is foreclosed from challenging causation simply on the basis that it could have achieved the same result through lawful means. See Lee-Moore Oil Co. v. Union Oil Co., 599 F.2d 1299, 1302 (4th Cir. 1979) (holding that, when an antitrust plaintiff alleged damages resulting from the defendant's concerted refusal to deal,"the fact that [the defendant] might have caused the same damages by a lawful [unilateral] cancellation of the contract is irrelevant"). For these reasons, the district court erred in dismissing appellants' section 1 claims.[1]

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[1] Grace argues that the Peerses lack standing to assert antitrust claims against it. Whether the Peerses have antitrust standing turns primarily on whether their injuries are direct or indirect, an inquiry that in turn depends on whether other, more directly affected parties exist. See, e.g., Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 541-42 (1983); Illinois Brick Co. v. Illinois, 431 U.S. 720, 730-31 (1977). Because the Peerses directly supplied mining rights to Grace, with no intervening party more directly implicated, we hold that they do have standing.

III.

Appellants next argue that the district court erred in dismissing their claims against HGSI. We agree.

The district court dismissed appellants' claims against HGSI on the ground that HGSI is exempt from the antitrust laws because it is a nonprofit organization pursuing noncommercial, sociopolitical objectives. 965 F. Supp. at 815. We hold that, regardless of whether an "exemption" for nonprofit organizations exists, HGSI does not qualify for such an exemption here because the transaction between HGSI and Grace was fundamentally commercial.

Section 1 of the Sherman Act includes no reference to an exemption for nonprofit organizations, stating instead that "[e]very person" who acts in restraint of trade or commerce falls within its scope. 15 U.S.C. § 1. In interpreting section 1, the Supreme Court has repeatedly confirmed that nonprofit organizations are not exempt from the section's reach. See NCAA v. Board of Regents, 468 U.S. 85, 100 n.22 (1984) ("There is no doubt that the sweeping language of § 1 applies to nonprofit entities, and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct." (citations omitted)); American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576 (1982) ("[I]t is beyond debate that nonprofit organizations can be held liable under the antitrust laws."); Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-87 (1975) ("We cannot find support for the proposition that Congress intended any such sweeping exclusion.").

A number of our sister circuits have held that, in certain circumstances, nonprofit organizations are not subject to antitrust liability. See, e.g., Dedication and Everlasting Love to Animals v. Humane Soc'y, 50 F.3d 710,

712 (9th Cir. 1995) (refusing to apply antitrust laws to solicitation of contributions by charity); Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Sch., Inc., 432 F.2d 650, 654-55 (D.C. Cir. 1970) (likewise for accreditation of educational institution by regional association). When these cases are examined closely, however, this seeming "exemption" is not really an exemption at all, but a straightforward interpretation of the plain language of section 1, which prohibits only restraints of "trade or commerce," not noncommercial behavior. See, e.g., United States v. Brown Univ., 5 F.3d 658, 666 (3d Cir. 1993) (applying anti-trust laws to nonprofit universities on the ground that payment of tuition in return for education constitutes "quintessential commercial transaction," with classification of transaction as commercial based on "totality of surrounding circumstances"); cf. NOW v. Scheidler, 968 F.2d 612, 622-23 (7th Cir. 1992) (refusing to apply antitrust laws to abortion protests even though defendants were not nonprofit organizations, on ground that behavior was noncommercial).

Regardless of how the "exemption" for nonprofit organizations engaging in noncommercial behavior is characterized, however, HGSI is subject to the antitrust laws in this case because the transaction between HGSI and Grace was essentially commercial. We emphasize that the dispositive inquiry is whether the transaction is commercial, not whether the entity engaging in the transaction is commercial. Ample evidence suggests the commercial nature of the transaction here. First, as the district court recognized, the transaction between HGSI and Grace had obvious effects on the commercial market for vermiculite: by constraining the supply of vermiculite, the transaction increased the price of the mineral. 965 F. Supp. at 815.

Further, as the district court also acknowledged, the transaction had direct commercial benefits for HGSI itself: by receiving hundreds of acres of land, HGSI not only realized a substantial"pecuniary gain," id. at 809, but also protected the alleged commercial interests of its management and members, which might be affected by mining of the land, J.A. at 575.

Even were we to hold that HGSI was somehow "exempt" from the antitrust laws by virtue of being a nonprofit organization, the Supreme Court has held, in the context of other exemptions, that an organization that would otherwise be exempt from the antitrust laws loses its exemption by conspiring with a nonexempt party. See Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 809-10 (1945) (labor exemption); United States v. Borden Co., 308 U.S. 188, 204-05 (1939) (agriculture exemption). Moreover, it is not necessary that HGSI have shared Grace's alleged anticompetitive motive in entering into a proscribed restraint; it is sufficient that HGSI, regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have anticompetitive effects. See Hydrolevel, 456 U.S. at 573-74 (holding nonprofit organization liable regardless of whether its agents acted with intent to benefit organization, provided restraint had anticompetitive effects); United States v. Paramount Pictures, Inc., 334 U.S. 131, 161 (1948) ("[A]cquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one."); Duplan Corp. v. Deering Milliken Inc., 594 F.2d 979, 982 (4th Cir. 1979) (per curiam) ("Where, as here, the [defendants] were knowing participants in a scheme whose effect was to restrain trade, the fact that their motives were different from or even in conflict with those of the other conspirators is immaterial."). In assessing whether HGSI is subject to the antitrust laws for its participation in the transaction with Grace, the only relevant inquiry is into the nature of the transaction, not the nature of HGSI's motive. Because the transaction at issue in

this case was fundamentally commercial, the district court erred in dismissing HGSI as a defendant.[2]was financially interested in the transaction with Grace.

IV.

Finally, appellants argue that the district court erred in finding that they failed to state a claim under Virginia state law in the Peers suits. Again, we agree.

The district court rested its dismissal of appellants' state law claims primarily on its interpretation of the provision in the contract between the Peerses and Grace that vested Grace with "sole discretion" to decide whether to mine the land. 965 F. Supp. at 831-32. It ruled that Grace had no implicit contractual duty under state law to use good faith in exercising its discretion as to whether to mine. Id. at 831. Not only was this ruling incorrect as a matter of standard contract law, but it also failed to take into consideration a prior Virginia case ruling on a virtually identical contract.

First, it is a basic principle of contract law in Virginia, as elsewhere, that although the duty of good faith does not prevent a party from exercising its explicit contractual rights, a party may not exercise contractual discretion in bad faith, even when such discretion is vested solely in that party. See Steven J. Burton & Eric G. Anderson,

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[2] In its brief, see Br. of Appellee HGSI at 23-25, HGSI makes the related, but discrete, argument that it should be immune from antitrust liability because its conduct in entering into the transaction with Grace was protected by the First Amendment, see NAACP v. Claiborne Hard ware Co., 458 U.S. 886, 907-15 (1982) (holding that politically motivated boycott was not subject to antitrust laws). We reject this argument for two reasons. First, HGSI simply does not identify any "speech" that would be restricted if HGSI were subject to the antitrust laws. Second, the Supreme Court has since limited its reasoning in Claiborne to cases in which the defendant is financially disinterested. See FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 425-28 (1990). As we noted above, see supra Part II, appellants have sufficiently alleged that HGSI

Contractual Good Faith 46-47 (1995) ("The courts could leave all discretion in performance unbridled. . . . No U.S. court now takes this approach . . . . Thus, contractual discretion is presumptively bridled by the law of contracts -- by the covenant of good faith implied in every contract."). Neither of the cases on which the district court relied is inconsistent with this rule. See Charles E. Brauer Co. v. NationsBank, 251 Va. 28, 35 (1996) (holding that exercise of explicit contractual right by bank against debtor was not bounded by good faith); Mahoney v. NationsBank, 249 Va. 216, 219-21 (1995) (same).

Second, the Virginia courts have already ruled, in earlier litigation involving a conveyance of vermiculite mining rights to Grace and a donation of those rights from Grace to HGSI, that a nearly identical contractual provision carries with it an implicit duty of good faith. Brandy, 32 Va. Cir. at 102. In Brandy, as here, a private landowner conveyed mining rights to Grace in return for a lump sum and royalty payments.[3] Id. at 98-99. The landowner, again as here, agreed in writing that Grace would retain "sole discretion" over whether to mine the property. Id. at 101. The court in Brandy concluded that such a provision entailed an implicit duty of good faith. Id. at 102 ("[T]he implied duty of good faith is particularly important in the context of mining leases, where the landowners must necessarily leave the decision making process to the expertise of mining companies."). Moreover, the court held that Grace's donation of the rights at issue to HGSI constituted a breach of that duty. Id. at 102-03.

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[3] Grace argues that Brandy should be distinguished because the transac tion at issue involved a lease, rather than a sale, of land. See Br. of Appellee Grace at 21. We find this distinction unpersuasive. Indeed, the argument for implying a duty of good faith may even be stronger in the latter case, because the original landowner in the former case could at least choose not to renew the lease were it unsatisfied with how Grace had exercised its discretion.

In predicting how the Virginia courts would construe this contractual provision, we refuse to presume either that they would deviate from a fundamental premise of contract law or that they would change their minds so soon after interpreting a nearly identical provision in a nearly identical context. Accordingly, we hold that the district court erred in dismissing appellants' state law claims.[4]

CONCLUSION

The judgment of the district court is reversed, and the case remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED

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[4] Because we hold that appellants have sufficiently alleged that Grace breached its implicit contractual duty to act in good faith, we express no view on appellants' theory that Grace also violated the explicit terms of the contract by entering into the nonmining agreements with HGSI. See Br. of Appellants at 30-31.

Filed: November 1, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 01-1850
(CA-95-13-3-C)

VIRGINIA VERMICULITE, LIMITED,

Plaintiff - Appellant

v.

THE HISTORIC GREEN SPRINGS, INCORPORATED,

Defendant – Appellee

and

W.R. GRACE & COMPANY - CONNECTICUT

Defendant

NATIONAL TRUST FOR HISTORIC PRESERVATON;
THE LAND TRUST ALLIANCE

Amicus Curiae

No. 01-1925
CA-95-15-3-c

VIRGINIA VERMICULITE, LIMITED
Platiniff - Appellee

v.

THE HISTORIC GREEN SPRINGS, INCORPORATED,
Defendant - Appellant

and

W.R. GRACE & COMPANY - CONNECTICUT
Defendatn

NATIONAL TRUST FOR HISTORIC PRESERVATON;
THE LAND TRUST ALLIANCE

Amicus Curiae

On Petition for Rehearing and Rehearing En Banc

Virginia Vermiculite's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court
/s/ Patricia S. Connor
CLERK

Federal Rule of Appellate Procedure 28(a)-(b)

(a). **Appellant's Brief.** "The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities--cases (alphabetically arranged), statutes, and other authorities--with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;

(7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

(8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(10) a short conclusion stating the precise relief sought; and

(11) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review.

01-1850(L), 01-1925 XAP

In The
United States Court of Appeals
For The Fourth Circuit

VIRGINIA VERMICULITE, LIMITED,
Plaintiff - Appellant/Cross-Appellee,

v.

THE HISTORIC GREEN SPRINGS, INCORPORATED,
Defendant - Appellee/Cross-Appellant,

W.R. GRACE & COMPANY-CONNECTICUT,
Defendant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF VIRGINIA AT
CHARLOTTESVILLE

BRIEF OF APPELLANT/CROSS-APPELLEE

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* * *

[Filed November 7, 2001]

Statement of Jurisdiction

This is a federal antitrust case with supplemental state law conspiracy and antitrust claims. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1367. This court has appellate jurisdiction under 28 U.S.C. § 1291 because final judgment disposed of all remaining claims on May 24, 2001 and Virginia Vermiculite ("VVL") filed timely notice of appeal on June 22, 2001.

Statement of Issues

I. Was it error to hold an illegal conspiracy to harm VVL caused no injury because one conspirator could have inflicted the same harm through other illegal conduct?

II. Was it error not to apply abbreviated Rule of Reason analysis to a naked restraint on output lacking any procompetitive justification?

III. Was it error not to allow VVL to prove at trial the restraint was illegal under the Rule of Reason?

IV. Was it error to deny all relief by both finding damages speculative and denying injunctive remedies?

Statement of The Case

VVL sued W.R. Grace & Company ("Grace") and Historic Green Springs, Inc., ("HGSI") for conspiring to injure VVL's business and unlawfully restrain trade by transferring all unused Virginia vermiculite reserves to HGSI under restrictions barring vermiculite mining. The district court dismissed the complaint, reasoning that VVL failed to allege causation because HGSI would not have allowed vermiculite mining on the properties even without the non-mining agreements. This Court reversed, holding such counterfactual causation analysis barred by *Lee-Moore Oil v. Union Oil*, 599 F.2d 1299 (4th Cir. 1979), which holds a conspirator who used unlawful means to cause harm cannot

defeat causation by arguing it could have caused the same harm through lawful means. *VVL v. W.R. Grace, et al.*, 156 F.3d at 539, 535 (1998). (JA 138, 135).

At summary judgment, the district court dismissed VVL's antitrust claims that defendants' conspiracy unreasonably restrained trade, but sustained the Virginia Conspiracy Act claim of a conspiracy to injure VVL's business. *VVL v. W. R. Grace, et al.*, 108 F. Supp.2d 549 (2000). (JA 245). Grace and VVL's co-plaintiffs settled. After a bench trial, the district court found HGSI violated the Virginia Conspiracy Act by conspiring with Grace to harm VVL's business. *VVL v. W. R. Grace, et al.*, 144 F. Supp.2d at 558, 609 (2001). (JA 594, 632). However, contrary to this Court's prior opinion, the lower court ruled once again that VVL could not prove causation because Grace could have inflicted the same injury through alternative means. *Id.* at 580, 599-600, 610. (JA 611, 625, 633). Strikingly, those alternative means would have been illegal. The lower court also denied damages for future lost profits as too speculative, even though the Virginia statute and *Lee-Moore Oil* expressly allow them, and then denied injunctive relief even though this meant VVL had no adequate remedy at law. *Id.* at 600. (JA 625).

VVL appeals these holdings, and the rulings awarding summary judgment against (instead of for) VVL on its antitrust restraint of trade claims. VVL does not appeal the dismissal of its claims of monopolization, attempted monopolization and conspiracy to monopolize.

Statement of Facts

Vermiculite is a rare mineral used for construction, agriculture, and horticulture. *Id.* at 562. (JA 597). Grace and VVL are the only domestic firms that mine and process vermiculite. *Id.* at 562, 571. (JA 604). Grace mines only in South Carolina. *Id.* at 562. (JA 597). VVL mines in both Virginia and South Carolina, the only states with usable

vermiculite reserves.[1] *Id.* (JA 597). Mined vermiculite is transported to plants located within 15 miles to extract vermiculite concentrate. *Id.* at 561. (JA 597).

During the early 1970s, Grace acquired all but one parcel with usable vermiculite reserves in Virginia, as well as adjoining land for logistics like transportation, through purchases or leases that entitled the original owners to per ton royalties. *Id.* at 563-67. (JA 598-601). Grace never used any of its Virginia acquisitions for vermiculite mining. *Id.* at 564. (JA 599). Although initially intending to mine, Grace's purpose later became to hold these land unmined for twenty years "solely" to keep them from its competitor, VVL. *Id.* at 566-67, 602. (JA 600-601, 627). VVL had entered the vermiculite market in 1976 by leasing and mining the Purcell property, the only Virginia parcel with vermiculite reserves not controlled by Grace. *Id.* at 565-66. (JA 599-600). At this point, Grace controlled 1344 acres with 1,520,000 tons of vermiculite reserves, while VVL's lease covered 120 acres with an initial 580,000 tons in reserves. *Id.* at 563-66, 577. (JA 598-600, 608). Thus, in 1976, Grace controlled 72% of Virginia vermiculite reserves, a percentage that increased as VVL depleted its Purcell reserves. By 1992, this property had no more than the 74,165 tons VVL produced from 1993-94 before exhausting this parcel, *id.* at 586 & Table 1 (JA 615, 634), and thus Grace controlled at least 95% of Virginia vermiculate reserves, and 100% of uncommitted Virginia reserves.

In April 1991, VVL offered $1.75 million for Grace's Virginia reserves. *Id.* at 567-68. (JA 601-602). Grace responded based on the following internal analysis. Grace calculated it would never use the Virginia reserves because the capital cost of building new facilities could not be recouped. *Id.* at 567. (JA 601). Grace thus believed "the only

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[1] Although usable reserves once existed in Montana, Grace had to abandon Montana operations and no other firm has profitably mined Montana vermiculite since, though one firm claims it could. *Id.* at 562, 567, 588. (JA 597, 601, 616).

benefit of retaining the reserves was to keep VVL from acquiring them." *Id.* (JA 601). Grace calculated it would gain a present value of $1.5 million in additional vermiculite profits over the next twenty years by preventing VVL from mining this land. *Id.* at 569, 573. (JA 602, 605). Grace also calculated that continuing to hold the properties would incur carrying costs of $1-1.1 million. *Id.* at 567, 574. (JA 601, 606). Thus, when it analyzed VVL's offer without considering the possibility of transferring the property for only non-mining use to HGSI or another third party, Grace concluded it should sell to VVL. *Id.* at 569. (JA 602).

In May 1991, HGSI, a nonprofit that had long opposed vermiculite mining, proposed that Grace donate the Virginia vermiculite reserves to HGSI. *Id.* at 568. (JA 602). In July 1991, Grace made VVL a counter-offer that Grace would sell the mining rights to VVL for $2.1 million plus about $1 million for the appraised value of the owned land. *Id.* at 570. (JA 603). In September 1991, VVL again offered $1.75 million. *Id.* (JA 603). VVL would have paid up to $2.2 million, but "understandably did not communicate this amount to Grace." *Id.* (JA 603).

Instead of pursuing negotiations with VVL, Grace decided to pursue instead an ingenious scheme to permanently foreclose the reserves while eliminating carrying costs and evading any antitrust duty to deal attached to holding the reserves. In September 1992, Grace agreed to donate its Virginia properties to HGSI on the condition that HGSI never allow them to be used to mine or transport vermiculite. *Id.* at 573-74, 579-80. (JA 605-606, 610-611). Because one owner wanted to exercise a buyback option and would likely resell to VVL, Grace and HGSI agreed to delay execution of this donation until they determined whether their scheme had successfully driven VVL out of business in Virginia. *Id.* at 577-78, 608. (JA 608-609, 631). All the other Virginia properties were transferred to HGSI in late 1992, with restrictions that had the "purpose

of preventing VVL from mining the properties and from using the properties to transport its vermiculite ore." *Id.* at 579. (JA 610).

Indeed, notwithstanding some contrary earlier statements, the district court ultimately found that Grace and HGSI conspired for the *sole* purpose of keeping vermiculite reserves and transportation access from Grace's sole domestic competitor, VVL, and thus forcing VVL to close its Virginia processing plant. *Id.* at 602-05. (JA 627-629). Grace's strategy was "solely to keep those reserves from its competitor." *Id.* at 602. (JA 627). "None of Grace's objectives in making the donations was to further preservationist interests." *Id.* at 604. (JA 608). HGSI knowingly helped Grace achieve this purpose. *Id.* at 602-03, 605. (JA 627, 629). HGSI's goal of preventing VVL from replenishing its depleting reserves was HGSI's "sole reason" for delaying one donation, and HGSI's "sole purpose" for assuming a lease. *Id.* at 603-04. (JA 627-628). This lease assumption could not be explained by "any preservationist or other potentially legitimate reason." *Id.* at 583, 591, 605. (JA 613, 619, 629). Likewise, for other properties "it is not plausible that . . . HGSI agreed to include restrictive covenants on those properties in furtherance of a preservationist purpose." *Id.* at 583, 603-04. (JA 613, 627-628). "HGSI and Grace agreed to restrictive covenants on [certain] properties solely for the purpose of preventing VVL from using [them] for transportation purposes." *Id.* at 604. (JA 628). HGSI's President "Ms. Ely was not concerned about the industrial uses of those properties, and ... HGSI's and Grace's original intent in including the restrictive covenants on [these] properties was not to further preservationist interests, but simply to injure VVL in its business." *Id.* (JA 604). The court also found that HGSI's president was not a credible witness. *Id.* at 588. (JA 616).

The court further found that, unlike normal conservation easements, the Grace-HGSI agreements "prohibited mining even if the land could be successfully restored." *Id.* at 582. (JA 612). Grace and HGSI also "replaced the general prohibition of any type of mining with a restriction that prohibited only the mining and transporting of vermiculite" on some land. *Id.* at 586-87. (JA 615-616). Finally, Grace and HGSI agreed to conditions prohibiting vermiculite mining or transportation even on properties that were "not located in the Landmark District." *Id.* at 582. (JA 612). None of this could be explained by preservationist purposes. Indeed, HGSI's president asked for the modification so she could put properties to "commercial/industrial use." *Id.* at 586, 604. (JA 615, 628). The only explanation is an aim of suppressing competition in vermiculite mining.

Although the trial court initially stated that Grace and HGSI harbored various "collateral, independent motives," *id.* at 587-88, 601 (JA 616, 626), this was superseded by the subsequent findings quoted above. The apparent conclusion was that, while other benefits exists, they were "collateral" precisely because they did not explain the actual pattern of behavior, which was consistent only with the purpose of cutting off VVL's access to vermiculite reserves. Although the court initially stated HGSI was generally motivated by preservation, the above findings make plain this motive did not explain its actual conduct here. Likewise, although the court stated Grace had the collateral motive of obtaining a tax deduction, the court later held that HGSI's President "knew it was not necessary for Grace to include restrictive covenants in order to donate to HGSI or to claim a tax deduction." *Id.* at 604. (JA 628). Any donation must also garner less financial benefit than a sale given a corporate tax rate below 40%. The court also stated Grace wanted "favorable public relations," *id.* 601 (JA 626), but also found HGSI's President "did not believe Grace was concerned about its standing among environmentalists." *Id.*

at 582, 604. (JA 612, 628). Finally, although Grace had the collateral motive of eliminating carrying costs, *id.* at 587 (JA 616), those carrying costs would be equally eliminated by a sale to VVL that would have garnered more revenue for Grace, so this cannot explain its donation absent the anticompetitive effect on VVL. Nor can avoiding carrying costs explain the restraints on mining or transportation of vermiculite.

VVL first pursued state contract law litigation to undo the defendants' foreclosure of these properties. Although VVL leased a parcel known as Brandy B in April 1992, HGSI controlled both Brandy A and the M.F. Peers properties, and "knew that VVL would have to cross Brandy A, in addition to the M.F. Peers property, to transport its ore from Brandy B to Purcell," where VVL had its processing plant. *Id.* at 583. (JA 613). HGSI also brought a state lawsuit arguing its Brandy A lease entitled it to stop mining on both Brandy A and B, and obtained a preliminary injunction barring mining of Brandy B. *Id.* at 584. (JA 613). In September 1993, the state court ruled Grace's transfer of the Brandy A lease to HGSI violated Grace's contractual duty of good faith, and voided the Brandy A lease. *Id.* at 585 (JA 614).; *Historic Green Springs, Inc. v. Brandy Farm, Ltd.*, 32 Va. Cir. 102-103 (1993). In June 1994, the Virginia Supreme Court found no reversible error and thus freed both Brandy A and B for mining by VVL. 144 F.Supp.2d at 587. (JA 616). VVL's successful state court litigation also caused HGSI to terminate the Nininger lease and Grace to proceed with its delayed donation, freeing A.D. Peers parcel A when the original owner exercised his buyback option. *Id.* at 585, 587. (JA 614, 616). The donation of the rest of the A.D. Peers property to HGSI went ahead, and while the written restrictive covenants in the original draft were deleted from the transfer documents because of the *Brandy* state court decision, "Grace and HGSI had an understanding that HGSI would prevent mining on the

A.D. Peers property to the same degree as it would with the other donated properties." *Id.* at 604, 608. (JA 628, 631).

After the state litigation succeeded in freeing the above properties, VVL began this federal litigation to remedy the foreclosure of the remainder. The district court found that "Grace and HGSI acted willfully, maliciously, and in concert," for the shared purpose of harming VVL's business and furthering their own interests, and in intentional disregard of the financial interests of the original owners entitled to per ton mining royalties. *Id.* at 588, 601-609. (JA 616, 626-632). The district court correctly concluded from this Grace violated its contractual duty of good faith, and defendants violated the Virginia Conspiracy Act. *Id.* at 601-09. (JA 626-632).

But the district court reached the erroneous legal conclusion that the conspiracy failed to cause VVL injury. The district court acknowledged that today "a substantial portion of the merchantable Virginian vermiculite reserves is foreclosed by the" Grace-HGSI conspiracy. 108 F. Supp.2d at 575. (JA 266). In particular, the conspiracy today continues to foreclose "both parcels of the M.F. Peers Property and A.D. Peers Parcel B" which "contain approximately fifteen years' worth of vermiculite reserves." 144 F. Supp.2d at 588. (JA 616). VVL needs those reserves, without which it will run out of reserves in 11 years. *Id.* (JA 616). Further, the inability to obtain transportation access across these lands had already increased VVL's costs by $1,245,941, and would through 2012 cost VVL an additional $2,701,073. *Id.* (JA 616). Nonetheless, the district court wrongly held causation could not be shown because without the conspiracy Grace could have prevented mining or transportation through alternative means. *Id.* at 598-99, 610. (JA 624-625, 633). The district court also wrongly held the current foreclosure of reserves inflicted only speculative injury because VVL

had enough reserves to last until 2012, and then wrongly concluded this justified denying both damages and injunctive relief. *Id.* at 600. (JA 625).

Further, although the trial court found an antitrust conspiracy, *id.* at 589-592 (JA 617-619), its summary judgment ruling barred plaintiff's claim that defendants' conspiracy unreasonably restrained trade, wrongly concluding plaintiffs had to prove market power and failed to introduce sufficient evidence to do so, 108 F. Supp. 2d at 574-79. (JA 265-269).

Summary of Argument

The district court erred in holding that, while the Grace-HGSI conspiracy was illegal, it did not injure VVL. The court erroneously reasoned VVL suffered no injury because, absent the illegal conspiracy, Grace might not have allowed vermiculite mining or transportation on the property anyway. This violates this Court's prior ruling in this case that, under *Lee-Moore Oil*, defendants cannot rebut causation by arguing that, absent their illegal conspiracy, they would have taken lawful unilateral action causing VVL the same injury. Even if the law of the case and *Lee-Moore Oil* did not govern, defendants surely cannot rebut causation by arguing that, absent their illegal conspiracy, they would have taken *illegal* unilateral or concerted action inflicting the same injury. Yet that is precisely what the district court held since the alternative conduct would have involved either (1) unilateral conduct (holding the property unmined) that would have violated Grace's good faith duty by profiting at the expense of the Peerses by suppressing vermiculite mining; or (2) concerted conduct (an agreement to transfer the property for non-mining use) that would have been just as illegal as the actual conspiracy with HGSI.

If the district court's rule were adopted, it would allow a defendant who could inflict harm on a plaintiff through two possible courses of illegal conduct to be

immune from liability for choosing either one. This cannot be the law. If *Lee-Moore Oil* does not permit causation to be rebutted by showing legal unilateral action could have inflicted the same injury, *a fortiori* showing that *illegal* unilateral or concerted action could have inflicted the same injury cannot rebut it.

Even if the district court's rule were adopted, its legal conclusion on causation applied the wrong legal standard of proof, and misapplied the law to the underlying facts, which merited precisely the opposite conclusion on causation.

The lower court also erred at summary judgment by failing to condemn the Grace-HGSI conspiracy as naked restraint on vermiculite reserves without any procompetitive justification, and by holding that VVL's proof of anticompetitive effects was legally insufficient to make out a Rule of Reason claim.

Finally, the district court erred regarding remedies. It dismissed VVL's claims for future lost profits as too speculative when the text of the Virginia conspiracy statute expressly provides for recovery of "lost profits," and *Lee-Moore Oil* does the same for antitrust claims. Further, the lower court failed to see that this holding left VVL without an adequate remedy at law, and thus dictated injunctive relief, which is also required to (1) unfetter the market from anticompetitive foreclosure; and (2) deprive HGSI of the fruits of its unlawful action.

Argument

Standard of Review

The lower court erroneously found no causation for any VVL claim, reasoning that VVL had to prove that, absent the conspiracy, Grace would not have prevented VVL from using the properties for mining or transportation by holding them or transferring them to

another third party for only non-mining use. *Id.* at 598-99, 610. (JA 624-625, 633). Because this causation holding rested on multiple errors of law, it should be reviewed *de novo* and reversed.

I. The District Court Erred in Holding That Causation Could Not Be Proven.

A. This Court's Mandate and Other Precedent Bar Conspirators From Defeating Causation by Arguing that They Would Have Unilaterally Taken the Same Action.

The lower court's reasoning was inconsistent with this Court's prior holding in this same case. To be sure, this Court began its causation analysis by stating that: "[T]he relevant question for causal purposes is not whether HGSI would have allowed mining in the absence of the nonmining agreements, but rather whether Grace would have allowed mining in the absence of both the donation and the nonmining agreements." 156 F.3d at 539. (JA 138). However, this Court went on to make clear that in resolving this relevant question a party who participates in an illegal conspiracy "is foreclosed from challenging causation simply on the basis that it could have achieved the same result through lawful means." 156 F.3d at 540. (JA 138). That holding was based on *Lee-Moore Oil*, which this Court correctly construed as holding that "when an antitrust plaintiff alleged damages resulting from the defendant's concerted refusal to deal, 'the fact that [the defendant] might have caused the same damages by a lawful [unilateral] cancellation of the contract is irrelevant.'" 156 F.3d at 540 (JA 138).(brackets in original). The clear meaning of this language is that when conspirators enter an illegal agreement to do something, they cannot defeat causation by arguing that without the agreement they would have unilaterally done the same thing they conspired to do.

Indeed, that was precisely the argument rejected in *Lee-Moore Oil*, which involved an agreement between plaintiff's oil supplier and others to deny oil to plaintiff. This Court held it legal error to conclude that the plaintiff failed to prove injury because the suppliers could have unilaterally denied oil anyway. 599 F.2d at 1302. It suffices that the plaintiff suffered injury from a denial of supply pursuant to an anticompetitive agreement; whether the same injury could have been inflicted by a unilateral denial of supply is irrelevant. *Id.*

Lee-Moore Oil reflects the general doctrine that, when defendants have agreed that one or both of them will not deal with another firm, they cannot then argue their agreement had no effect because they would not have dealt with that other firm anyway. For example, a defendant's liability for tying is not affected by evidence that parties to the tying agreement would not have dealt with the foreclosed supplier even absent the agreement. *United Shoe v. United States*, 258 U.S. 451, 462 (1922); X AREEDA, ELHAUGE & HOVENKAMP, ANTITRUST LAW ¶1753c, at 294-96 (1996). A court should not deny causation from a violation because the defendant could have inflicted the same injury on plaintiff with legal conduct. *Irvin Indus. v. Goodyear Aerospace*, 974 F.2d 241, 245-46 (2d Cir. 1992). The only causal connection that must be shown is between plaintiff's injury and defendant's actual illegal conduct; plaintiff need not show the same injury could not have resulted had the defendant instead engaged in legal conduct. *Id.*

This doctrine exists for good reasons. Where defendants themselves thought they needed an agreement to restrain them from making a certain market choice, it is highly likely the agreement was in fact necessary to prevent them from making that choice. While it is always conceivable defendants entered into an agreement they thought had no purpose or effect, it is doubtful. Moreover, any counterfactual inquiry into what defendants would have done absent their

conspiracy involves a highly burdensome and uncertain inquiry into a state of affairs that never existed. Since it is defendants' own fault that this unrestrained state of affairs did not exist, it is unfair and poor policy to make plaintiffs bear the burden of this counterfactual inquiry. *See, e.g., Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."); *J. Truett Payne v. Chrysler Motors*, 451 U.S. 557, 566 (1981) ("Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. . . . [I]t does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.").

In any event, this is the causal standard that the Fourth Circuit set forth in the binding mandate for this case, which the district court was bound to follow and forms the law of the case on this issue.

> Few legal precepts are as firmly established as the doctrine that the mandate of a higher court is "controlling as to matters within its compass." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939). Indeed, it is indisputable that a lower court generally is "bound to carry the mandate of the upper Court into execution and [may] not consider the questions which the mandate laid at rest." *Id.* Because this "mandate rule" is merely a "specific application of the law of the case doctrine," in the absence of exceptional circumstances, it compels compliance and remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.

United States v. Bell, 5 F.3d 64, 66 (4th Cir. 1993). The trial court ignored this Court's mandate when it accepted the counterfactual argument that the conspirators would not have dealt with VVL even if they had not entered into an illegal conspiracy against such dealing.

B. Violators Cannot Defeat Causation by Arguing They Would Have Taken Alternative Illegal Action Causing the Same Injury.

Even if conspirators could rebut causation by arguing that absent their conspiracy they "could have achieved the same result through *lawful* means," *but see* 156 F.3d at 540 (JA 139) (emphasis added), surely they cannot disprove causation by arguing that absent their conspiracy they could have achieved the same result through alternative *unlawful* means.

The district court correctly recognized it was contractual bad faith for Grace to act in furtherance of its own interest with intentional disregard for the financial interest of the Peerses by suppressing mining on these properties. 144 F Supp 2d at 606. (JA 630). Additionally, the district court recognized , that suppressing mining on these properties by transferring them to HGSI for non-mining use thus violated the contractual duty of good faith, as well as the Virginia Conspiracy Act. *Id.* (JA 630). The court further found that Grace's "strategy" of holding the reserves unmined was "solely" to keep those reserves from VVL. *Id.* at 602. (JA 627).

It follows that transferring the properties to some other third party for non-mining use also would have violated both Graces's good faith duty and the Virginia Conspiracy Act. Surely one cannot avoid liability for an illegal conspiracy by arguing that one would otherwise have entered into another illegal

conspiracy having the same effect. Yet that is precisely what the district court held. *Id.* at 598-99. (JA 624-625).

Likewise, even unilaterally holding onto the properties without mining them would have been "solely" to keep them from being mined by VVL, and thus would also have been in furtherance of Grace's own financial interest and to the detriment of, and with intentional disregard for, the rights of the Peerses. Accordingly, even if the district court were correct that absent the conspiracy Grace might have continued to hold the properties unmined, *id.* (JA 624-625), that alternative course of action would have violated Grace's contractual duty of good faith.

In short, both of the posited alternative courses of action – holding the properties unmined or selling them to a third party for nonmining uses – would have been illegal under the district court's own holdings. Thus, the district court rule means that participants in an illegal conspiracy can rebut causation by arguing that they could have inflicted the same harm through alternative unlawful means. Such a rule would wreak havoc with causation law. It would mean that, whenever a defendant had a choice between two illegal courses of conduct for harming a plaintiff, the defendant would be immune from liability for choosing either. The following analogy illustrates the absurdity of this notion: Suppose Jeff wanted to murder Jill, and contracted to have Mutt perform the deed. In his trial for conspiracy to murder Jill, could Mutt fairly argue that the agreement caused Jill no harm because Jeff would have killed her anyway?

C. The District Court Applied the Wrong Standard of Proof on Causation.

Assuming *arguendo* that causation could be defeated by showing the conspirators would have used alternative illegal means to inflict the same injury, the district court (i)

applied the wrong standard of proof for judging the possible alternatives; and (ii) failed correctly to apply the law to the facts, since the court's own factual findings dictated an opposite legal conclusion on causation.

The district court acknowledged that the standard of proof is whether the illegal conduct was a "material cause" of plaintiff's injury. 144 F.Supp. 2d at 598. (JA 624). But it wrongly interpreted this to mean that VVL had to "prove by a preponderance of the evidence that Grace *would have* sold or leased its properties to VVL" absent the conspiracy. *Id.* at 599. (JA 625). However, under the material cause standard, it is "enough that the antitrust violation contributes significantly to the plaintiff's injury even if other factors amounted in the aggregate to a more substantial cause." II AREEDA & HOVENKAMP, ANTITRUST LAW ¶363a, at 219-220 (rev. ed. 1995). As this Court held in its prior ruling in this case, a plaintiff need only prove that "it was 'reasonably probable' that the behavior in question caused their injury." 156 F.3d at 539 (JA 138) (quoting *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 149 (4th Cir. 1990).) This *Advanced Health-Care* standard in turn came from *Catlin v. Washington Energy*, 791 F.2d 1343 (9th Cir.1986). Plaintiffs need only show a "reasonable probability" that defendants' antitrust violation caused plaintiffs' injury, and "need not rule out 'all possible alternative sources of injury.'" *Id.* at 1347.

The Virginia Conspiracy Act might be understood to incorporate tort causation standards, but they are the same. A tortfeasor's conduct satisfies causation if "his conduct is a substantial factor in bringing about the harm," Restatement (Second) of Torts §431(a), and makes him liable for all damages if apportionment among two or more causes is impracticable, *id.* at §433A. "As between the proved tortfeasor who has clearly caused some harm, and the innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.

Id. at 433B, comment (d). "If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present." PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 268 (5th ed. 1984).

Thus, even if (contrary to law) the district court could entertain the counterfactual claims that without the conspiracy Grace would have suppressed mining and transportation on the properties through alternative means, it should have ruled for VVL on causation as long as there was any "reasonable probability" that Grace instead would have sold or leased the property to VVL. VVL clearly satisfied such showing, and the district court's contrary ruling reflects its application of the wrong legal standard, and should be reversed under *de novo* review.

Consider first the alternative of continuing to hold the properties unmined. The district court found that Grace had calculated the net present value of keeping its Virginia reserves from competitor VVL was $1,500,000. 144 F. Supp.2d at 569, 573. (JA 602, 605). Further, Grace calculated that continuing to hold the properties unmined would incur $1-1.1 million in additional carrying costs. *Id* at 567, 574. (JA 601, 606). Thus, the net gain from holding the properties unmined was only $400,000-500,000. Since VVL had offered $1.75 million, and was willing to pay $2.2 million, *id.* at 568 (JA 602), Grace rationally would have struck a deal with VVL rather than continue to hold the properties unmined. Indeed, the district court's own factual findings show that when Grace analyzed VVL's offer without considering the possibility of transferring the property for only non-mining use to HGSI or another third party, Grace concluded that Grace should sell to VVL. *Id.* (JA 602). VVL thus clearly met the "reasonable probability" standard that should have been applied. Moreover, even if the "would have" standard were correct, the district court's legal conclusion that this

standard was not met reflects an erroneous application of law to its own factual findings, which is reviewable *de novo*. *South Carolina State Ports Auth. v. M/V Tyson Lykes*, 67 F.3d 59, 61 (4th Cir.1995).

The district court also erred by failing to consider that continuing to hold the properties unmined would have subjected Grace to the risk of legal liability. Because the posited alternative conduct would have incurred damages for breach of contract, as discussed above, there was at least a reasonable probability that Grace would have forgone that alternative and instead fulfilled its contractual duty of good faith by allowing VVL to mine the properties. The district court provided no explanation why it neglected this risk of contractual liability.

Further, this Court's prior opinion in this case noted a possible risk of antitrust liability, *Aspen Skiing*-liability for refusing to deal with one's competitor without any procompetitive justification. 156 F.3d at 539-40. (JA 138). Grace also faced risks of antitrust liability under both the essential facilities doctrine, *Laurel Sand v. CSX Transp.*, 924 F.2d 539, 544 (4th Cir. 1991), and the doctrine against hoarding assets without using them to keep them from rivals. *See, e.g., American Tobacco v. United States*, 328 U.S. 781, 803-804 (1946); III AREEDA & TURNER, ANTITRUST LAW at 8, 250, 110 (1978). The district court rejected these possibilities because it had earlier held VVL failed to prove the monopoly power necessary to trigger such antitrust liability. 144 F. Supp.2d at 598. (JA 624). There are two problems with this logic. First, as shown below, the district court erred in concluding that plaintiff failed to define the market. Thus, Grace was in fact proven to have monopoly power in Virginia vermiculite reserves, and a concomitant antitrust duty to stop suppressing the inputs that its sole domestic competitor needed. Second, the question here is not whether Grace was proven to have monopoly power in this litigation, but whether in 1992 it would have seen any

risk that a court might so conclude. Grace had no reason in 1992 to expect it would receive a litigation windfall from the exclusion of a plaintiff's expert's testimony, which is what led the district court to conclude erroneously that VVL could not prove a market. 108 F. Supp.2d at 577-584, 600-01. (JA 268-274, 286-287). Grace, in fact, did believe that it had dominant market power. 144 F. Supp.2d at 566. (JA 600). Grace also thought that, if it could cut VVL off from its Virginia vermiculite reserves, VVL would have to close its Virginia plant. *Id.* at 569, 572-73, 577, 601-03. (JA 602, 605, 608, 626-627). Further, Grace actually calculated a monetary value, $1.5 million, from the anticompetitive suppression of inputs needed by its rival to compete. *Id.* at 569, 573. (JA 602, 605). These facts are enough to conclude that, even if Grace was not willing to admit that it *did* have monopoly power, Grace had every reason to worry it might be held to have monopoly power, and an antitrust duty to deal, if it continued to hold the mining rights. The district court erred by failing to consider the possibility of this risk of antitrust liability, which, given treble damages, clearly shows there was at least a "reasonable probability" Grace would have dealt with VVL, rather than continue to hold the properties unmined.

Alternatively, the court hypothesized that Grace might have sold its property to third parties but retained the mining rights, thus allowing the sold property to be used only for nonmining use. *Id.* at 599. (JA 625). This counterfactual scenario fails on three scores. First, as noted above, it would have constituted a violation of Grace's contractual duty of good faith. Second, as also noted above, if Grace had entered into such an agreement with a third party, it would have constituted precisely the same sort of illegal conspiracy as the transfer Grace actually made to HGSI, subjecting Grace to the risk of treble damages under both antitrust law and the Virginia Conspiracy Act. Thus, this alternative course of conduct created a risk of liability that clearly creates at least a "reasonable probability" Grace

would have instead chosen to deal with VVL. Third, such a sale would have affected only the property Grace owned, and not the property Grace leased, and the leased property inflicted virtually all the carrying costs, indeed $1.045 million. PTX 317 (Record at G013746-G013747 (JA 707). Thus, even if Grace had made $1 million by selling the owned property without the mining rights, *id.* at 570 (JA 603), it would still face the question of whether to sell the retained mining rights and leased properties to VVL for $1.75-2.2 million or incur $1.045 million in carrying costs to reap a $1.5 million anticompetitive benefit. Again, this creates at least a reasonable probability that Grace instead would have chosen to sell to VVL, even if Grace were wrongly permitted to consider its illicit gain from suppressing mining by VVL.

D. VVL is at Least Entitled to Attorney's Fees and Costs for Exposing and Defeating the Illegal Conspiracy.

Even if this Court confirms the district court's counterfactual conclusions regarding causation, VVL is still entitled to recover damages in this case. Under Virginia common law, every intentional tort carries with it nominal damages. *See, e.g., Town & Country Properties, Inc. v. Riggins*, 249 Va. 387, 399, 457 S.E.2d 356, 365 (1995) ("An award of nominal damages is appropriate when there is a legal right to be vindicated against an invasion that has produced no actual, present loss of any kind or where, from the nature of the case, some injury has been done but the proof fails to show the amount.") (quoting *News Leader Co. v. Kocen*, 173 Va. 95, 107-108, 3 S.E.2d 385, 390-391 (1939)). A conspiracy is an intentional tort. The Virginia Conspiracy Act does not limit plaintiff's recoverable damages. Va. Code Ann. § 18.2-500 ("any person who shall be injured in his reputation, trade, business or profession by reason of a violation of § 18.2-499, may sue therefore and recover three-fold the damages by him sustained, and the costs of the suit,

including a reasonable fee to plaintiff's counsel; and *without limiting the generality of the term, 'damages'* shall include loss of profits." (emphasis added). As such, nominal damages are available to VVL.

The tort here has been established. 144 F. Supp.2d at 609 (JA 632) ("The court concludes that VVL proved by clear and convincing evidence that HGSI and Grace combined, associated, agreed, mutually undertook or concerted together for the purpose of willfully and maliciously injuring VVL in its reputation, trade, business, and profession, and that they did so by unlawful means."); *id.* at 588 (JA 616) ("In furtherance of their joint intent to injure VVL in its reputation, trade, business, and profession, Grace and HGSI acted willfully, maliciously, and in concert."). VVL has a legal right to be dealt with in a lawful manner. This right must be vindicated.

From the very nature of this case, it is obvious that some injury to VVL has occurred. For over eight years VVL has battled in court, fought to maintain its operations in Virginia, and survived. Even if the proof presented to the district court were deemed to fail to show with certainty the exact extent of VVL's injuries, it is still readily apparent that at least a nominal amount should have been considered by the district court.

For example, VVL was damaged at least to the extent that it incurred costs in attempting to negotiate an off-road route across the M.F. Peers property, since HGSI "did not seriously consider providing VVL with" such a route. *Id.* at 583. (JA 613). VVL also was damaged at least to the extent that it incurred corporate costs in dealing with the Grace/HGSI conspiracy, in that, outside of litigation, VVL's officers were forced to expend time and resources to attempt to overcome the detrimental effects that the conspiracy had upon VVL's business.

At the very least, VVL is entitled to at least one dollar in nominal damages due to HGSI and Grace's intentional invasion of VVL's legal rights. As such, VVL is also entitled to its attorney's fees and costs under the Virginia Conspiracy Act. Va. Code Ann. § 18.2-500.

E. Conclusion on Causation

The district court erred in its legal conclusion that VVL failed to establish causation. Since this was the only ground for the court's decision not to award transportation damages to VVL on the Virginia Conspiracy Act claim, reversing this error alone entitles VVL to an appellate order directing the district court to award VVL $3,765,014 in damages, trebled to $11,295,042, as well as to its litigation costs and attorney fees. Va. Code Ann. § 18.2-500. Indeed, even if causation were not proven, the district court's findings mean that VVL succeeded in establishing an intentional tort that should have entitled VVL to nominal damages, litigation costs, attorney fees, and injunctive relief. Nor should the district court's erroneous legal conclusion on causation be permitted to bar VVL's claim that the Grace-HGSI conspiracy unreasonably restrained trade.

II. The District Court Erroneously Failed to Condemn the Conspiracy Under Abbreviated Rule of Reason Analysis.

A. Abbreviated Rule of Reason Analysis.

Under the Rule of Reason, a restraint on market choice that is unclothed by any plausible procompetitive justification is a "naked restraint" that the Rule of Reason summarily condemns without further market inquiry. "Absent some countervailing procompetitive virtue - -such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services ... an agreement limiting consumer choice by impeding the 'ordinary give and take

of the market place,' cannot be sustained under the Rule of Reason." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) (citation omitted). *Indiana Dentists* concerned dentists who agreed to withhold x-rays from insurers, believing that would improve dental care quality. The Court held that even under the Rule of Reason the agreement should be summarily condemned without any need for inquiry into market definition, market power, or anticompetitive effect because no credible procompetitive justification had been offered. *Id.* at 459-60. Under the Rule of Reason: "'[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output,'" but rather "such a restriction 'requires some competitive justification even in the absence of a detailed market analysis.'" *Id.* at 460; *NCAA v. Board of Regents*, 468 U.S. 85, 109-110 (1984). Likewise, the Supreme Court condemned an engineering association restraint without requiring any proof of market power where none of the proffered justifications were procompetitive. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 693-95 (1978).

This naked restraint doctrine reflects both antitrust policy and statutory language. Under the Rule of Reason, antitrust doctrine weighs a restraint's procompetitive and anticompetitive effects. When defendants offer no plausible procompetitive justification, there is nothing on the positive side of the ledger and no point in burdening courts and litigants with complicated inquiries into the extent of the anticompetitive effects caused by a restraint on free market choice. To the contrary, such burdensome inquiry undermines antitrust deterrence:

> Defining markets and determining the presence of market power is not socially costless. Using up the time and energy of courts and lawyers wastes resources when the challenged conduct of a pernicious type lacks any offsetting legitimate objective. Moreover, complicating and perhaps forestalling the condemnation of such conduct weakens deterrence of such unredeemed behavior.

VII P. AREEDA, ANTITRUST LAW ¶ 1509, at 411 (1986).

This same conclusion follows from a straightforward reading of the statutory text. Sherman Act §1 states that [e]very contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal." Since "contract, combination, or conspiracy" simply means "agreement," VI AREEDA, ANTITRUST LAW 3, 17 (1986), this amounts to a statute that says: "Every agreement in restraint of trade is illegal." This statutory language does not mean every agreement with an "ancillary" restraining effect on trade is illegal, or else all contracts would violate antitrust law even though they are largely procompetitive. *NCAA*, 468 U.S. at 98; *Professional Engineers*, 435 U.S. at 687-88. But the statutory language does mean that the "inquiry is confined to a consideration of impact on competitive conditions" -- i.e., confined to considering whether the agreement imposes a net (i.e., unreasonable) restraint on trade by having anticompetitive effects that outweigh its procompetitive effects. *Professional Engineers*. 435 U.S. at 690; *NCAA*, 468 U.S. at 103. Under the statute's plain meaning, *every* agreement that imposes a *net* restraint on trade is illegal. Thus, a restraint permissible as "ancillary" must have procompetitive effects outweighing its anticompetitive effects. Where defendants cannot even articulate a procompetitive justification, the restraint

cannot be ancillary and must be condemned under the statute because any net effect it has must be anticompetitive.

The seminal case on ancillary restraints is *United States v. Addyston Pipe*, 85 F.271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899). There, Judge Taft concluded that "when a restraint has nothing good to be said for it, courts should not bother themselves with determining 'how much restraint' is consistent with the public interest. That is, the historical justification for the per se rule against 'naked' restraints is that courts are not adept at making qualitative judgments about the amount of competition that is good for society; that determination must be left to the unrestrained market." XI HOVENKAMP, ANTITRUST LAW ¶1905, at 209 (1998). Judge Taft's "language clearly establishes a recognizable category of restraints whose intended purpose is to diminish competition for whatever reasons. In such cases courts are not to balance the extent of possible diminution against the value to be placed on some offsetting social good offered as a defense. Engaging in such balancing forces the courts to 'set sail on a sea of doubt.' Rather, *all* such restraints are to be condemned." *Id*

B. Applying the Naked Restraint Doctrine Here.

The Grace-HGSI conspiracy was plainly a naked restraint on competition. It had no procompetitive justification. Its only effect and sole purpose was to suppress the output of Virginia vermiculite reserves and transportation access to keep them from VVL. 144 F. Supp.2d at 602-605. (JA 627-629). Further, the motive for restraining reserves and transportation access was to restrict VVL's market output of processed vermiculite, an anticompetitive gain worth $1.5 million to Grace. *Id.* at 569, 573, 602. (JA 602, 605, 627). Indeed, the objective purpose of restricting vermiculite output was manifest on the very face of the written non-mining agreements. Such "[r]estrictions

on . . . output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *NCAA*, 468 U.S. at 107-08; XI HOVENKAMP, *supra*, ¶1906, at 210 (defining a restraint "as 'naked' if it is formed with the objectively intended purpose or likely effect of ... decreasing output"). This conspiracy could in no way be characterized as "ancillary" to a purpose of *increasing* vermiculite output. *Id.* at 210-11 (contrasting a "naked" restraint with an ancillary restraint because "a restraint is ancillary if its objectively intended purpose is . . . increased output . . .").

This conspiracy initially foreclosed at least 95% of Virginia vermiculite reserves, and 100% of uncommitted reserves. 144 F. Supp.2d at 586 & Table 1. (JA 615, 634). Although VVL's state litigation freed some reserves, the conspiracy continues to foreclose vermiculite reserves and transportation access. The district court found the lack of transportation access will increase VVL's costs by over $3.9 million. *Id.* at 588. (JA 616). The district court also acknowledged "a substantial portion of the merchantable Virginian vermiculite reserves is foreclosed by the" Grace-HGSI conspiracy. 108 F. Supp.2d at 575. (JA 266). VVL has a keen interest in buying those reserves and transportation access today to assure future production and lower costs, but cannot do so because of the continuing effects of this conspiracy. *Id.*; 144 F.Supp.2d at 588. (JA 616).

HGSI will presumably argue that, notwithstanding their direct restraint on output, their agreement was not naked because it had the "procompetitive" justification of furthering preservation. This argument fails on two scores.

First, this asserted justification does not explain the actual conspiracy. As detailed above, the district court found that (1) HGSI had no preservationist purpose for much of the land covered by its conspiracy, and knew Grace had no preservationist purpose for any of it; and (2) preservation cannot explain many features of the conspiracy, including

prohibiting mining even where complete restoration was possible, allowing non-vermiculite mining, and prohibiting vermiculite mining and transportation outside the preservation district. *Id.* at 579-80, 604. (JA 610-611, 628).

Second, however desirable preservation might be, it is not a *pro*competitive purpose, and "inquiry is confined to a consideration of impact on competitive conditions." *Professional Engineers.* 435 U.S. at 690. Indeed, this Court already explicitly categorized suppressing vermiculite mining as an "anticompetitive effect." This Court stressed that "the transaction between HGSI and Grace had obvious effects on the commercial market for vermiculite: by constraining the supply of vermiculite, the transaction increased the price of the mineral." 156 F.3d at 541. (JA 139). This Court then concluded that it did not matter why HGSI desired this effect: "it is sufficient that HGSI, regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have *anticompetitive effects* ... the only relevant inquiry is into the nature of the transaction, not the nature of HGSI's motive." *Id.* (emphasis added).

This Court's prior ruling was clearly correct. "Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." *Professional Engineers,* 435 U.S. at 688. "Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA,* 468 U.S. at 103-04.

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation

> of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

NCAA, 468 U.S. at 104 n.27.

Whatever one thinks about the merits of the preservationist goals allegedly advanced by suppressing vermiculite mining and transportation in Virginia, they clearly are not procompetitive goals. They are goals that rest on a premise contrary to antitrust law: that unfettered market competition produces a bad allocation of resources, here by excessively developing land. "The Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Professional Engineers*, 435 U.S. at 696; *NCAA*, 468 U.S. at 117. They are also goals that are advanced by suppressing market output, not increasing it. When "an antitrust plaintiff claims an unlawful 'naked' restraint" the only permissible defense is that "the challenged restraint actually increases efficiency, lowers costs, provides a superior product, or otherwise naturally tends to reduce price or increase output and by means no readily achievable absent the restraint." XI HOVENKAMP, *supra*, ¶1907, at 218. It is impermissible to offer the defense that "[w]hile the restraint does increase price or reduce output, such effects are acceptable because they are outweighed by ... other factors." *Id.*

Whether or not the anticompetitive goals of preservation are meritorious does not matter. "[G]ood motives will not validate an otherwise anticompetitive practice." *NCAA*, 468 U.S. at 101 n.23. The Supreme Court has made this point repeatedly, ruling that because only

procompetitive justifications are admissible, courts cannot consider arguments that restraints protected "public safety," *Professional Engineers*, 435 U.S. at 681, 690, "quality dental care," *Indiana Dentists*, 476 U.S. at 462-63, or product quality, *Standard Sanitary v. United States*, 226 U.S. 20, 41 (1912), prohibited illegal copying, *Fashion Originators v. FTC*, 312 U.S. 457, 467-68 (1941), defended constitutional rights, *FTC v. Superior Court Trial Lawyers*, 493 U.S. 411, 421-24, 427 (1990), or preserved amateur sports, *NCAA*, 468 U.S. at 101-03. The Sherman Act provides no "immunity from prosecution on the basis of their good intent." *Trial Lawyers*, 493 U.S. at 427 n.11 (1990).

This antitrust doctrine exists even though there may be sound public interest justifications for restricting market choice. It exists because it is up to Congress to decide when those other objectives merit deviating from the competition policy Congress set in the Sherman Act, and not up to parties who want to use their own economic power to achieve objectives they were unable to persuade Congress to adopt.

> [T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. ... [T]he purpose of the analysis ... is not to decide whether a policy favoring competition is in the public interest ... Subject to exceptions defined by Congress, that policy decision has been made by Congress.

Professional Engineers, 435 U.S. at 691-92. Parties must go to Congress, not the courts, if they want a special exemption from the Sherman Act. *Patrick v. Burget*, 486 U.S. 94, 105-06 (1988). They should not burden courts with decisions about how to balance competition against other social goals that require open-ended political judgments that judges have

neither the authority nor any legal standards for making. "Even assuming occasional exceptions to the presumed [good] consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *Professional Engineers*, 435 U.S. at 695.

C. California Dental is Not to the Contrary.

The lower court erroneously rejected the naked restraints doctrine based on its misreading of *California Dental Association v. FTC*, 119 S. Ct. 1604 (1999). The lower court stated, "First, as the Supreme Court made clear, the court cannot simply assume, without further analysis, that a restriction on output is *prima facie* anticompetitive." 108 F. Supp.2d at 573. (JA 264). It is difficult to imagine a statement more at odds with fundamental antitrust precepts. If a restriction on output is not prima facie anticompetitive, what is? *California Dental* did not rule to the contrary. In that case, the restraint was not on output, but on professional *advertisements* lacking full disclosure or making unverifiable quality claims. 119 S. Ct. at 1608-09. To distinguish the above cases, the *California Dental* Court stressed that it was unclear whether a restraint on such professional advertising would increase or decrease market output.

> [T]he relevant output for antitrust purposes here is presumably not information or advertising, but dental services themselves. *The question is* not whether the universe of possible advertisements has been limited (as assuredly it has), but *whether the limitation on advertisements obviously tends to limit the total delivery of dental services.*

Id. at 1615 (emphasis added). Thus, *California Dental* does not apply to direct restraints on output, just to restraints on something else, such as advertising, that may or may not *indirectly* decrease output. *California Dental* nowhere

purported to overrule the well-established doctrine that where defendants impose a *direct* restraint on output, they must prove a procompetitive justification to survive rule of reason scrutiny.

The lower court next erroneously concluded, "Second, the type of burden-shifting advocated by the plaintiffs is exactly what the Supreme Court disapproved of in *California Dental.*" 108 F. Supp.2d at 573. (JA 264). Here, the lower court confused two different burden-shifting claims. One claim is that a plaintiff need not prove anticompetitive effects unless the defendant can at least *articulate* a plausible procompetitive justification. That was VVL's burden-shifting claim, supported by copious precedent on naked restraints, and nothing in *California Dental* purported to change it. Another claim is that a plaintiff need not prove anticompetitive effects unless the defendant provides empirical *evidence* to substantiate an articulated procompetitive justification. That was the burden-shifting claim being made in *California Dental,* which the majority rejected when the challenged restraint only indirectly affects price or output. For such indirect restraints, a defendant who can articulate a theoretically plausible procompetitive justification need not offer empirical evidence that those procompetitive effects actually existed until the plaintiff first introduces empirical evidence of anticompetitive effects.

There are thus two crucial distinctions. First, unlike here, *Calfornia Dental* involved an indirect restraint on output. Second, also unlike here, a theoretically viable procompetitive justification *was* offered in *California Dental.* The majority thought that the "advertising restrictions might plausibly be thought to have a net procompetitive effect" by reducing misleading advertising and increasing accurate advertising. 119 S. Ct. at 1613-16. Even the lower court and dissent acknowledged the

theoretical "plausibility" of defendants' procompetitive justifications, and that the problem was "an empirical one." *Id.* at 1615; *id.* at 1620-21 (dissent). *California Dental* thus does not support the lower court's proposition that defendants can escape naked restraints doctrine without even articulating any procompetitive justification. *California Dental* merely concluded that *when* a theoretically plausible procompetitive justification *was* offered for an indirect restraint on output, deeper inquiry than abbreviated rule of reason analysis was necessary to determine whether empirically the restraint likely would have on balance procompetitive or anticompetitive effects on output.

The lower court mistakenly thought *California Dental* held that a plaintiff must provide empirical evidence of obvious anticompetitive effects to invoke abbreviated rule of reason scrutiny. But what *California Dental* stated was that quick look review does not apply when the "anticompetitive effects of given restraints are far from intuitively obvious." 119 S.Ct. at 1607. The key words are "intuitively" and "obvious," which clearly indicate that the Court was *not* talking about an inquiry that requires empirical evidence, but rather a theoretical inquiry. It meant that the *theoretical* link between the restraint and a "net anticompetitive effect" on consumer choice or producer prices or output must be fairly obvious from the restraint. *Id.* at 1613-15 (citing not empirical evidence but theoretical articles on market for lemons problems to support proposition that link to net anticompetitive effect was not obvious). The Court reasoned sensibly that such a "net anticompetitive effect" could hardly be obvious where there was a *plausible* economic theory that the restraint would procompetitively increase consumer choice and market output. *Id.*

> The point is not that the CDA's restrictions necessarily have the *procompetitive* effect claimed . . . The point, rather, is that the *plausibility* of competing claims about the effects of the professional advertising restrictions *rules out the indulgently abbreviated review* to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown.

Id. at 1617-18. Since only the plausibility of the offered procompetitive justification justified unabbreviated inquiry into whether the restraint's "net" effect was anticompetitive, the lack of such a plausible justification would indicate an "obvious anticompetitive effect that triggers abbreviated analysis." *Id.* at 1617-18.

California Dental thus merely adopts the sensible position that in a case where plausible economic theories create opposing predictions about whether any effects of an indirect restraint on output would be anticompetitive or procompetitive, *then* some empirical inquiry is necessary to sort out which theory is accurate.

> The point is that before a *theoretical* claim of anticompetitive effects can justify shifting to a defendant the burden to show *empirical* evidence of procompetitive effects, *as quick-look analysis in effect requires,* there must be some indication that the court making the decision has properly identified the *theoretical* basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.

Id. at 1615 n.12 (emphasis added). This passage makes several points clear: (1) Quick-look analysis requires defendants to bear the burden of showing empirical evidence of procompetitive effects *if* the plaintiff has made a valid *theoretical* claim that any effects are anticompetitive; (2) such quick look review is only appropriate where the Court has properly considered the *theoretical* basis for plaintiffs' claim and considered whether a countervailing theory might instead indicate that the net effects are actually procompetitive; and (3) where there are countervailing theories and the circumstances are complex, the inquiry must turn on empirical evidence rather than assumptions.

Even if *California Dental* were at all ambiguous, the presumption should be against the district court's interpretation that plaintiffs must bear the costly burden of empirically proving anticompetitive effects to invoke quick look scrutiny. First, a court must be presumed not to adopt holdings that are oxymoronic. The lower court's misinterpretation would create a nonsensical Catch-22: a quick look would only be possible after an elaborate inquiry, but once an elaborate inquiry was made, a quick look would no longer be possible.

> [I]n making the determination whether a restraint is naked . . . actual price and output effects need not be measured. Indeed, doing so would destroy the value of the naked/ancillary distinction, whose purpose is to save judicial resources by permitting condemnation of some restraints without such elaborate and error inviting inquiries.

XI HOVENKAMP, *supra*, ¶1906, at 214. Second, such a holding would eliminate the naked restraints doctrine, and overrule numerous Supreme Court cases. Instead, full-scale review would now be required in every Rule of Reason case. A court must be presumed not to have intended to overrule

a long line of precedent without saying so. Far from indicating such intent, *California Dental* expressly indicated a prior case had correctly applied naked restraint doctrine by "finding quick-look analysis adequate after assessing and rejecting *logic* of proffered procompetitive justification." 119 S.Ct. at 1613 (emphasis added). Thus, *California Dental* remains committed to the doctrine that quick look review is warranted where, as here, defendants have not offered any logical procompetitive justification.

Moreover, this Court has already ruled that "the transaction between HGSI and Grace had *obvious* effects on the commercial market for vermiculite: by constraining the *supply* of vermiculite, the transaction increased the price of the mineral." 156 F.3d at 541 (emphasis added). (JA 139). This ruling rejects the lower court's odd notion that a restriction on output might not be anticompetitive, and means that this case involves a direct restraint on output. Further, even if the restraint here were indirect, this Court's holding that the anticompetitive effects were "obvious" would suffice to invoke quick-look rule of reason scrutiny. The law of the case thus dictates a conclusion that the restraint here is a naked one subject to summary condemnation.

D. Conclusion on Naked Restraints.

Because the Grace-HGSI agreement was naked restraint, VVL was entitled to summary judgment that Grace and HGSI violated Sherman Act § 1 and Virginia Antitrust Act § 59.1-9.5 without need for any inquiry into the evidence on anticompetitive effects and market definition.

III. The District court Erred in Dismissing VVL's Antitrust Conspiracy Claims.

The district court not only erroneously failed to apply quick look review but also mistakenly dismissed VVL's restraint of trade claims under full-scale Rule of Reason scrutiny. The court reasoned that (1) without proving market power VVL could not prove anticompetitive effects, 108 F. Supp.2d at 575-76, 579 (JA 266-267, 269); and (2) VVL could not establish market definition necessary to prove market power. *Id.* at 576-79. (JA 267-269). Both were legal error, either of which requires reversal. The court also erroneously concluded the claim for transportation damages did not allege antitrust injury.

A. Market Power Need Not Be Proven When Anticompetitive Effects Are Directly Shown.

The lower court should have ruled that under Rule of Reason scrutiny an actual anticompetitive effect obviates any need to prove market power. "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Indiana Dentists*, 476 U.S. at 460-61 (quoting VII AREEDA, ANTITRUST LAW ¶ 1511, at 429 (1986)). There, since some x-rays were withheld from the market, this sufficed to show the agreement had at least some anticompetitive effect without any need to prove market power, and thus justified condemnation absent any countervailing procompetitive effect. *Id.*

Here, the restraint clearly had at least some anticompetitive effect. It initially foreclosed at least 95% of Virginia vermiculite reserves and 100% of uncommitted reserves, and even today continues to foreclose a substantial

share of Virginia vermiculite reserves and deprive VVL of land access that would lower its transportation costs. 144 F.Supp.2d at 586 & Table 1. (JA 615, 634). As in *Indiana Dentists*, the fact that the agreement here actually led to the desired product being withheld suffices to prove enough of an anticompetitive effect that the defendant must prove a procompetitive justification. It is enough that VVL has actually been unable to obtain the desired vermiculite reserves or transportation access. *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1319 (9th Cir.1996) (sufficient anticompetitive effect shown by fact plaintiff was unable to gain access to defendants' bowl games). Indeed, Grace itself quantified a $1.5 million value from the agreement's expected anticompetitive effect on VVL output. 144 F.Supp.2d at 569. (JA 602).

The district court mistakenly rejected this point because *Indiana Dentists* applied an abbreviated Rule of Reason analysis the disrict court had rejected. 108 F.Supp.2d at 579. (JA 610). But *Indiana Dentists* expressly rested on *alternative* grounds. It held that market power need not be proven both because the absence of any procompetitive justification made the restraint naked, *and alternatively* because proof of actual detrimental effects obviated any need for a plaintiff to prove market power. *Indiana Dentists*, 476 U.S. at 460. The Court stressed the latter point governed "even if the restriction imposed by [defendants] is not sufficiently 'naked' to call [the first] principle into play." Further, the Court adopted this point from a treatise making a point about general Rule of Reason analysis unrelated to naked restraint doctrine. VII AREEDA, *supra*, at 429.

Thus, the lower court was plainly wrong that only abbreviated Rule of Reason review embraces the principle that market definition and power need not be shown when actual anticompetitive effects are proven. Even if full-scale Rule of Reason analysis applies, the actual anticompetitive

effects meant that VVL did not need to define a market and prove market power. Instead, those anticompetitive effects obligated defendants to prove a procompetitive justification. Here, where defendants failed to do so, or even to articulate a procompetitive justification, it is VVL that was entitled to summary judgment.

Alternatively, VVL's proof of anticompetitive effects should have sufficed under medium-scale Rule of Reason analysis. *California Dental* was careful to rule that even if naked restraint or quick-look review did not apply, some version of less-than-full-scale Rule of Reason review might. 119 S.Ct. at 1617. *California Dental* simply concluded that *if* a plausible procompetitive justification has been introduced, the antitrust plaintiff had to make *some* initial empirical showing of actual anticompetitive effect or market power before the burden shifted to the defendant to offer empirical grounding for its asserted procompetitive virtue. *Id.* at 1615. But "plenary market examination" need not be required, just a "less quick look" that suffices to produce a "confident conclusion about the principal *tendency* of a restriction." *Id.* at 1617-18 (emphasis added). The showing in this case that transportation access and a substantial share of Virginia vermiculite reserves were actually foreclosed more than suffices to meet any initial empirical burden plaintiffs might have to show anticompetitive effects.

Under either full-scale or mid-scale Rule of Reason review, the demonstration of some anticompetitive effects puts the burden on defendants to provide evidence to support their redeeming procompetitive justification. VII AREEDA, *supra*, at 429. "The permissible proof at this stage is limited. The defendant may not show that competition does not work in the market at issue or that the challenged restraint furthers social welfare generally. ... Rather, the defendant must show that -- contrary to the plaintiff's evidence -- the real effect of the restraint is to increase output (or decrease price)." XI HOVENKAMP, *supra*, ¶1914,

at 313-14. HGSI, to the contrary, aims to decrease the output of vermiculite reserves and mining even if one credits their preservationist claims. HGSI's failure to articulate any logically valid procompetitive justification for their nonmining agreement, let alone substantiate it with any evidence, leaves one able to conclude with confidence that the tendency of their restraint is principally anticompetitive. Thus, even if the naked restraint doctrine did not apply, VVL should have been awarded summary judgment against HGSI on the restraint of trade claims based on the actual evidence of anticompetitive effects.

B. Sufficient Evidence on Market Definition and Power Was Offered.

Even if VVL were not entitled to summary judgment on the above theories, the lower court erred in its legal conclusion that VVL did not present enough evidence on market definition. Quite separate from the testimony of its excluded expert, plaintiff introduced overwhelming evidence that a vermiculite reserves market existed. This evidence was almost all incorporated into factual findings, but rejected based on several legal errors. Correcting those errors shows that it was VVL that was entitled to summary judgment on market definition, and *a fortiori* should not have had summary judgment granted against it.

1. The Evidence Established a Virginia Vermiculite Reserves Market.

First, the defendants themselves concluded that, if they could cut VVL off from the Virginia vermiculite reserves, VVL would have to close its Virginia plant. 144 F.Supp.2d at 569, 572-73, 601-03 (JA 602, 605-607, 626-627); *see also id.* at 577 (JA 608) (VVL had concluded the same). This meant that Virginia vermiculite reserves had no reasonably interchangeable substitute, otherwise these parties instead would have anticipated that VVL would shift to those substitutes to keep its plant open. Because processing occurs within 15 miles of mining, *id.* at 561 (JA 597), VVL could not just have switched to South Carolina reserves. When initiated, the conspiracy covered 95% of Virginia vermiculate reserves and 100% of uncommitted reserves, *id.* at 586 & Table 1 (JA 614,624), which surely suffices to prove market power.

Second, Grace itself calculated that it would get $1.5 million in additional vermiculite concentrate business over twenty years if it could cut off VVL's access to Virginia reserves. *Id.* 569, 573, 602 (JA 602, 605, 627). This calculation meant that Grace must have thought it had market power because, in a perfectly competitive market, eliminating one rival would not increase Grace's profits. In particular, if VVL could just switch production to its South Carolina plant, there would have been no reason to think Grace would gain additional vermiculite concentrate business. Likewise, if downstream domestic vermiculite were interchangeable with foreign vermiculite, and vermiculite with perlite, there would have been no reason to think VVL's lost business would go to Grace rather than to foreign vermiculite producers or makers of perlite.

Third, the district court acknowledged that VVL had supported its argument "that if Grace were to increase the price of mining rights in Louisa County by 5%, VVL would have to continue purchasing those rights from Grace

because transportation costs would prohibit VVL from turning to another geographic region, such as South Carolina" with "evidence that costs of switching to another region--*i.e.* transporting vermiculite from another region, or building a new processing mill elsewhere--are prohibitively expensive." 108 F. Supp. 2d at 580. (JA 270). Indeed, switching costs were so high that a hypothetical monopolist could impose a price increase of 943% without causing substitution. *See* SJ Opp Ex. 9 at G008602. (JA 679-689). Such evidence that substitution would not occur in response to a 5% price increase should have sufficed to establish a vermiculite reserves market. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, §§1.0-1.22 [hereinafter "Antitrust Guidelines"]; *Satellite Television v. Continental Cablevision*, 714 F.2d 351, 356 (4th Cir.1983).

2. The District Court Made Numerous Legal Errors in Rejecting a Vermiculite Reserves Market.

The District Court rejected this clear proof of a Virginia vermiculite reserves market based on the following legal errors.

First, the lower court adopted the assertion of defense expert Mills that a geographical market cannot have a single buyer. 108 F. Supp. 2d at 582. (JA 272). This proposition is unfounded. Under standard antitrust law, "Market definition focuses solely on demand substitution factors--i.e., possible consumer responses." Antitrust Guidelines § 1.0. For geographic markets, the analysis begins by defining the geographic market narrowly as "the location of . . . *each plant*," and asks what would happen if a hypothetical monopolist in that location imposed a 5% price increase. *Id.* § 1.21 (emphasis added). If the price increase could be sustained profitably, then a relevant geographic market has been shown. *Id.* If sufficient consumers would rapidly switch to sellers in other locations to make the price increase unprofitable, then the Guidelines add to the

geographic definition the next-closest sellers, and reiterate the analysis until it arrives at the most narrow geographic definition where a 5% price increase could be sustained. *Id.* "A relevant market is a group of products and a geographic area that is *no bigger than necessary* to satisfy this test." *Id.* § 1.0 (emphasis added). Nothing in this analysis precludes the conclusion that the most narrow sustainable market definition may have only one buyer in it, anymore than it would preclude the converse conclusion that some markets only have one seller.

Here, one must begin with the posited Virginia vermiculite reserves. VVL did not simply assert that it was the only buyer in this market. Rather, it relied on the fact that Grace calculated the capital costs of building a new plant close to the Virginia reserves could not be recouped. 144 F. Supp. 2d at 567, 574-75. (JA 601, 606-607). Grace also had determined that it was uneconomical to ship Virginia reserves to its South Carolina plant. SJ Opp Ex. 9 at G008602. (JA 679-689). Since Grace was the only other domestic buyer of vermiculite reserves, such evidence proved that there was no potential buyer other than VVL for Virginia vermiculite reserves. Thus, it was proper to ask how this one buyer would respond to a 5% price increase, and VVL presented the evidence noted above that switching costs would prevent it from switching to other reserves.

The lower court instead chose to credit an assertion by defense expert Mills that potential buyers included all vermiculite firms "because mining companies such as VVL and Grace (potential buyers of Louisa County vermiculite) consider reserves available anywhere to them in determining where to establish a plant." 108 F. Supp. 2d at 582, 584. (JA 272, 274). But such an unfounded assertion cannot rebut the factual finding that companies do not actually consider reserves available anywhere because the capital costs are prohibitive. This is especially true where the assertion is made by a defense expert who did no

independent investigation, and "didn't undertake [the sort] of investigation . . . to do an analysis that would support defining a relevant market." Mills Cross at 332-35. Mills further admitted he had done no investigation about transportation costs, and had neither investigated nor knew about any evidence showing that alleged substitutes actually constrained prices. *Id.* at 337, 340, 466-67. The lower court nonetheless erroneously treated Mills' testimony as conclusive "evidence" that the "commercial reality" was that the reserves market must include reserves anywhere in North America. 108 F. Supp. 2d at 582, 584. (JA 272, 274).

Second, the lower court held that VVL could not claim that Grace had market power because VVL had built a plant in Virginia knowing it would only be able to turn to Virginia vermiculite reserves. *Id.* at 582-84. (JA 272-274). The court relied on two cases that distinguished *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). *Kodak* was a case where, *after* buying defendants' machine, plaintiffs could not switch to non-defendant parts because they would not work in the purchased machine, and the defendant began a (post-purchase) policy of tying the parts to service. The Supreme Court held this evidence sufficed to show market (even monopoly) power in parts. The two cases that distinguished *Kodak* held it inapplicable when the plaintiff claims that contractual *terms* locked the plaintiff into dealing with the defendant, and the tie with other products was a contractual term known when the parties *entered* the contract. *Lee v. Life Ins.*, 23 F.3d 14, 19-20 (1st Cir.1994); *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 438-41 (3d Cir.1997). The lower court's conclusion that these two cases mean VVL could not prove market power was flawed on multiple levels.

Here, plaintiff does not claim that its entry into a contractual relationship with defendant created market power. Instead, this is a garden-variety case where

plaintiff's only voluntary act was to enter a market: here, by building a plant in Virginia. New entrants do not somehow "assume the nuisance" that incumbent firms will engage in illegal misuse of their market power. If that were so, any buyer who buys a computer knowing Microsoft had monopoly power in operating systems could not sue no matter what anticompetitive conduct Microsoft might choose to adopt in the future. To the contrary, antitrust law entitles entrants to a market where incumbent firms are barred from misusing their market power to engage in antitrust violations. A doctrine that immunized monopolists from suit by any entrant would be a horrible deterrent to market entry in all monopolized markets.

Moreover, unlike *Lee* and *Queen City*, here the anticompetitive conduct was *not* a tie known when the lock-in was created. Because tying involves using market power in one product to force buyers to take another, it makes sense to measure market power when the forcing occurs. That is all *Lee* and *Queen City* hold. The point about timing that these cases emphasized to distinguish *Kodak* was that the Kodak lock-in came *before* the alleged anticompetitive conduct, 23 F.3d at 19-20; 124 F.3d at 440-41, a distinction that justifies treating this case like *Kodak* since Grace's market power was also created before the anticompetitive conspiracy began.

Finally, unlike *Lee* and *Queen City*, but like *Kodak*, here the lock-in results because substitutes are not functionally interchangeable, not because of contractual terms. *Lee* and *Queen City* were concerned that parties who contracted with a defendant in highly competitive markets might later complain that their contract terms locked them in to dealing with the defendant and thus created market power. These courts were understandably reluctant to consider all midstream contract situations the equivalent of monopoly power. Thus, *Queen City* distinguished *Kodak* because there, once the Kodak machine was bought, non-

Kodak parts were not functionally interchangeable, whereas the supplies in *Queen City* were functionally interchangeable and plaintiffs only claim was that "contractual restraints render otherwise identical products non-interchangeable for purposes of relevant market definition." 124 F.3d at 438-41. Here, vermiculite reserves outside Virginia are not functional substitutes.

Third, the lower court adopted the assertion of defense expert Mills that an antitrust plaintiff must prove the existence of, and anticompetitive effects in, a downstream market to bring suit against an upstream anticompetitive restraint. 108 F. Supp. 2d at 577-79. (JA 268-269). Although such proof was in fact provided, *see infra*, requiring proof regarding the downstream market was also legally erroneous. If the district court were correct, then a business facing a conspiracy to fix cement prices could not sue unless it proved that it passed on the higher prices to its downstream customers. That is precisely contrary to the *Illinois Brick* doctrine, which concentrates claims on the most directly injured party precisely so that they are "spared the burden of litigating the intricacies of pass-on." *Illinois Brick v. Illinois*, 431 U.S. 720, 745-46 (1977).

Moreover, countless cases have recognized that firms can sue for an anticompetitive restraint that injures them in an upstream market without proving a downstream market harm, even when the upstream market is regional and any downstream effect seems unlikely. *See, e.g., Mandeville Island Farms v. American Crystal Sugar*, 334 U.S. 219 (1948) (condemning a buying cartel in a regional beet market that seemed unlikely to have any price effect on the downstream worldwide market in refined sugar); *United States v. Pennzoil*, 252 F. Supp. 962 (W.D. Pa. 1965) (condemning merger creating local buyer market power in Pennsylvania crude oil market that seemed unlikely to affect downstream prices in the worldwide market for refined oil); *United States v. Rice Growers*, 1986-2 Trade Cas. (CCH) ¶67,288, at 61,459

(E.D.Cal. 1986) (condemning merger creating local buyer market power in California paddy rice market that seemed unlikely to affect downstream prices in worldwide market for milled rice). These cases recognize that the anticompetitive effect on the upstream market suffices. Likewise, *Indiana Dentists* concluded that anticompetitive effects were sufficiently proven by evidence that in two of the localities within the state covered by an agreement not to provide x-rays, insurers were "actually unable to obtain ... x-rays." 476 U.S. at 460. It did not matter that there was no proof that insurers' failure to obtain x-rays actually made downstream "dental services ... more costly." *Id.* at 461.

The lower court thought otherwise, because it concluded that any claim of upstream market harm must involve a leveraging theory. 108 F.Supp.2d at 579-80. (JA 269-270). This confuses two matters. Monopoly leveraging is a claim that the defendant used monopoly power in one market to cause the plaintiff an anticompetitive effect in another market. The leveraging plaintiff must prove an anticompetitive effect in the second market because that is what its injury flows from. Here, in contrast, VVL claims that the conspiracy in the upstream vermiculite reserves market caused it harm *in that market*. VVL is not claiming that it is harmed because of anticompetitive effects in the downstream vermiculite concentrates market, which would instead harm buyers in that market. The anticompetitive effect and claim here is precisely what it would be if VVL were instead a victim of a boycott by Virginia vermiculite reserve owners who had no business interests downstream. The fact that here the Virginia reserves conspiracy was motivated by Grace's desire to cause anticompetitive effects downstream does not alter the purely upstream effects that VVL needs to show.

3. Though Not Required, the Evidence Also Established a Downstream Vermiculite Concentrates Market.

Even if required, plaintiff presented ample evidence to prove a downstream North American vermiculite concentrates market.

First, Grace itself believed there was a vermiculite product "market" with high entry barriers. 144 F. Supp.2d at 566. (JA 600). Significant entry barriers were also confirmed by Grace's calculations that building any new vermiculite plants would be uneconomical and take five years. 144 F. Supp.2d at 567, 574-75. (JA 601, 606-607). Not only were the barriers to entry insuperable, but this same evidence showed that any entry would take five years, SJ Ex. 1 at G16779. Likewise, Grace documents repeatedly referred to a "North American market," including one noting that "Grace perceived itself as 'dominat[ing] the North American market,' producing 72% (249,200 of 343,800 tons) of vermiculite consumed in North America." 144 F. Supp.2d at 566. (JA 600). This conclusion was confirmed by transportation costs. "Because of the high cost of shipping vermiculite relative to product value, little importing or exporting of the material occurs in North America." SJ Ex. 1 at G16778 (JA 655); *see also id.* at G16780 (JA 657). ("Suppliers outside of North America face the relatively high cost of shipping vermiculite."). Apart from one South African firm, Grace and VVL were the only significant sellers of vermiculite in North America, and eliminating VVL's Virginia production would have eliminated 17% of domestic sales. 144 F. Supp.2d at 562, 566, 586, Table 1. (JA 597, 600, 615, 634).

Second, the district court acknowledged VVL presented evidence that "the prices of perlite and vermiculite move in opposite directions." 108 F. Supp. 2d at 578 n.18. (JA 268). This sufficed to show vermiculite was in a separate product market. "If Products A and B are in the

same economic market, then their prices should tend to move closely together." CARLTON & PERLOFF, MODERN INDUSTRIAL ORGANIZATION 614 (3rd ed. 2000).

> The absence of close price relationships among products presumptively indicates that they are in separate markets. . . . When the prices of two products (or of the same product in two regions) change in the same direction and by similar amounts over a substantial period of time, they are presumptively in the same market.

IIA AREEDA, HOVENKAMP & SOLOW, ANTITRUST LAW ¶534, at 180, 182 (1995). The district court instead chose to credit a defense expert's unsupported assertion that vermiculite and perlite are in the same product market, 108 F. Supp. 2d at 578 (JA 268),even though that expert admitted he had done no "serious examination" of the price movements of vermiculite or perlite, Mills Cross at 342, and had neither investigated nor knew of any evidence that perlite would constrain vermiculite prices. *Id.* at 340.[2]

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[2] Indeed, the district court bizarrely concluded that the evidence was "unrebutted" that perlite was in the same product market because two businessmen trying to bargain down the price for buying vermiculite reserves told sellers during negotiations that they had could not pay a higher price because perlite constrains vermiculite prices. 108 F. Supp. 2d at 578. (JA). Not only was such evidence in fact conclusively rebutted by the evidence on price movements, it was inherently unreliable since these businessmen had every incentive to slant the facts to bargain for a lower price. Moreover, even if unrebutted and credible, such businessmen statements would not show vermiculite and perlite are in the same market. Every separate product is constrained by some other product in the sense that if the price is raised to sufficiently supracompetitive levels, substitution will occur. But the question for product market definition is whether the constraining effect of the alleged substitute would prevent a hypothetical monopolist of that product from raising prices 5% over *competitive levels.*

Third, the evidence proved that the asserted downstream substitutes were not significant enough to prevent a hypothetical vermiculite concentrates monopolist from raising prices by 5%. The alleged substitutes were actually in the market for *expanded* vermiculite, whereas the downstream market in which VVL sold was the market for vermiculite *concentrates*. Grace's own data showed that virtually all sales of mid-sized vermiculite *concentrates* go to independent expanders. SJ Opp Ex. 58 at G010092. (JA 699). And it was undisputed that independent expanders have *no* substitutes for vermiculite concentrate: they either expand vermiculite or go out of business. Further, downstream substitution for expanded vermiculite could not prevent a hypothetical monopolist in vermiculite concentrates from raising prices by 5% for two reasons. Grace's own data proved profit margins for expanded mid-sized vermiculite were so high that an expander would absorb a price increase of over 100%. *Id.* at G010923. Further, Grace did in fact

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> Even if [defendant] could not raise the price . . . one cent without losing . . . sales, that fact would not disprove market power . . . "[T]he existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant *already* exercises significant market power."

Eastman Kodak v. Image Technical Services, 504 U.S. 451, 470-71 (1992) (emphasis in original); *Consul v. Transco Energy*, 805 F.2d 490, 495 (4th Cir.1986) (defining "market power" as "the ability to raise prices above levels that would exist in a perfectly competitive market."). "The fact that [a related] market imposes a restraint on prices in [this market] by no means disproves the existence of power in those markets." 504 U.S. at 470. Nor does the fact that defendant "cannot set . . . prices without regard to the impact on [another] market . . . The fact that the cross-elasticity of demand is not zero proves nothing: the disputed issue is how much of an impact an increase in . . . prices has on . . . sales and on [defendant's] profits." *Id.* at 470 n.17. The fact that perlite might provide some constraint on vermiculite prices *at some point* thus does not at all rebut, let alone eliminate any genuine issue about, the convincing proof that vermiculite is a separate market.

sustain a 74% price increase in mid-sized concentrates, or 51% when adjusted for inflation. 108 F. Supp. 2d at 585. (JA 274).

Fourth, the factual findings indicated that the downstream market should be limited to producers located in North American. While one South African firm exported vermiculite concentrate to North America, Grace and VVL primarily sold in North America. 144 F. Supp.2d at 562. (JA 597). If vermiculite concentrate were truly a worldwide market, it should move in both directions. The fact that it was imported but not exported indicates, absent other evidence, that the imports were induced by supracompetitive domestic prices. Consistent with this, high shipping costs created such a large obstacle to imports that only this South African firm was able to overcome it, and only because it supplied larger vermiculite sizes. *Id.* at 586. (JA 615). Grace itself calculated that this South African firm was the lowest cost foreign producer and that even it had a delivered cost of selling vermiculite concentrate in North America that was 34% higher than the North American producers. SJ Opp. Ex. 59 at G015524. (JA 701). This evidence meant any importation was induced by supracompetitive domestic pricing, which both proves domestic market power and justifies excluding imports from the geographic market,[3] which would increase not only Grace's market share but the share of market production it aimed to eliminate to 22%. 144 F. Supp.2d at 566 & Table 1. (JA 600, 634).

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[3] Economics and antitrust law do not consider substitution at prevailing prices to indicate two products are in the same product market unless those prevailing prices are competitive. IIA AREEDA, *supra*, ¶539, at 208-09; CARLTON & PERLOFF, *supra*, at 612-14; AREEDA & HOVENKAMP, ANTITRUST LAW ¶539 at 157 (Supp. 1999) (noting it is error to "infer from observed substitution that two different products . . . are in the same market" in that "we may be observing significant substitution because [one product] is *already* being priced at a supracompetitive level").

Fifth, this is the rare case where we have direct evidence that a hypothetical monopolist could sustain a 5% price increase in the asserted product and geographic market because we have direct evidence that a real firm -- Grace -- did just that. Grace made a conscious decision to impose price increases on mid-sized vermiculite concentrates and did so, raising average sales prices from $80/ton in 1992 to $140/ton in 1998, for a whopping 74% price increase, or 51% inflation-adjusted. 108 F. Supp. 2d at 585. (JA 274). But this dramatic price increase did *not* lead any consumers to switch until the price increase went from 51% to 74% in 1998, when Grace lost its first customer from this price rise. [Record at G14896, G014957, G005520, G10868.] (JA 691, 693). The lower court wrongly rejected this evidence because it accepted defendants' (disputed) claim that this mid-size price increase resulted from an increase in cost, 108 F. Supp. 2d at 585-86 (JA 274-275), but that claim is irrelevant because the market definition question is not whether the price increase was legitimate, but whether it was sustainable.

4. Conclusion on Market Definition.

Compare the extensive evidence above to the far lesser evidence held sufficient to prove a market in *M&M Medical Supplies v. Pleasant Valley Hospital*, 981 F.2d 160, 168 (4th Cir. 1992) (en banc). There this Court held it erroneous to grant summary judgment against a market definition supported only by evidence that buyers "predominantly" do not substitute suppliers outside that market, with "predominantly" meaning that 65% turned to suppliers inside the county market and 35% turned to suppliers outside. *Id.* at 162, 164. Here, in the alleged Virginia reserves market, firms inside the county turned 100% to sellers inside the county and 0% outside. That alone should have sufficed to meet the minimal standards of *M&M*, a standard *a fortiori* satisfied by the overwhelming other evidence presented.

The lower court distinguished *M&M* because there a credentialed expert provided an affidavit concluding a market existed. 108 F. Supp. 2d at 581. (JA 271). But as the district court itself acknowledged, an antitrust plaintiff is not required to hire an expert. *Id.* at 576 n.16. (JA 267). Nor does willingness to pay an expert entitle parties to findings unsupported by the evidence. Rather, what matters are the underlying facts, not the expert opinion.

> When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them. As we observed in *Matsushita*, "expert opinion evidence ... has little probative value in comparison with the economic factors" that may dictate a particular conclusion.

Brooke Group v. Brown & Williamson Tobacco, 509 U.S. 209, 242-43 (1993). *M&M* upheld the expert because it ruled that the evidence it described sufficed to prove a market, not because hiring an expert entitles a party to establish a market on lesser evidence than other parties. That en banc opinion binds this panel.

In any event, even if the applicable standard on market definition is far tougher than *M&M*, the evidence above clearly met it in this case. If proof of market definition and power were required, the district court should have granted VVL summary judgment on those issues and then rendered a judgment for VVL since HGSI introduced no procompetitive justification. *A fortiori* the

court erred by holding that the above evidence failed to even raise a genuine issue of fact as to market definition and power.

C. The Trial Court Erroneously Concluded Transportation Damages Involved No Antitrust Injury.

Although acknowledging future lost profits involved antitrust injury, 108 F. Supp. 2d at 595 (JA 283), the lower court concluded that transportation damages did not because VVL did not show its higher transportation costs had downstream anticompetitive effects in the vermiculite concentrates market. 144 F. Supp. 2d at 597-98.[4] (JA 623-624). The lower court was simply wrong that a party injured by an anticompetitive effect in its own market cannot recover in antitrust unless they prove they passed on their injury downstream. If that were true, a nationwide conspiracy to fix trucking prices would not be actionable unless the firms that suffered higher prices from it could prove they passed on their higher trucking prices downstream to their consumers. Not only is that not the law, it is precisely contrary to the *Illinois Brick* doctrine, which aims to relieve antitrust plaintiffs of any need to prove such pass-on effects. *Illinois Brick*, 431 U.S. at 745-46.

In any event, the court ultimately acknowledged that VVL did offer proof that these "transportation damages in fact led it to raise the price of its vermiculite," which would be direct harm of a downstream anticompetitive effect. 144 F. Supp.2d at 598. (JA 624). The court wrongly declined to

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[4] The court also erroneously reasoned that there could be no antitrust injury because transportation costs are a part of doing business and VVL transports its ore a greater distance in South Carolina. *Id.* at 599-600. (JA 625). But both those facts are utterly irrelevant. If an agreement to fix trucking prices in Virginia raises prices to supermarket chains, it would be no defense that trucking costs are part of doing business or that the chains already pay higher trucking prices in New York.

consider this evidence based again on its mistaken theory that Grace could have accomplished unilaterally what it in fact accomplished through conspiracy. *Id.* at 598-99. (JA). Its antitrust injury holding thus fails for the same reason as its causation holding.

IV. The District Court Erroneously Both Found Lost Profits Damages Too Speculative and Denied Injunctive Relief.

Although conceding VVL's transportation damages were non-speculative, the lower court found that VVL's lost profits damages were too speculative because VVL would not lose profits until it ran out of reserves until 2012. 144 F.Supp.2d at 600 (JA 625); 108 F. Supp.2d at 596, 601. (JA 283, 287). This holding was erroneous, as was the district court's conclusion that injunctive relief should also be rejected.

A. Future Profits Damages Were Not Too Speculative

The text of the Virginia Conspiracy Act explicitly states that recoverable "'damages' shall include loss of profits." Va. Code Ann. § 18.2-500. Such lost profit claims must always rest on the assumption that current profits and market conditions will continue in the future, since no other assumption could be established with less uncertainty. Claims for lost profits are also clearly countenanced by antitrust law. *Lee-Moore Oil* is again directly relevant, stressing: "'In many, if not most, private antitrust actions, the principal element of damage is precisely what we are now considering, the loss of profits caused by a refusal to deal.' . . . [Such lost profits are] precisely 'the type of loss that the claimed violations . . . would be likely to cause.'" 599 F.2d at 1304 (citations omitted). *Lee-Moore* also explicitly rejected the district court's reasoning that VVL cannot recover lost profits because it was not driven from the market but rather enjoys higher profits. *Compare* 144 F.

Supp. at 598 (JA 624), *with* 599 F.2d at 1304-05 (rejecting both those claims because damages should be awarded if the plaintiff's profits would have gone up even more absent the restraint of trade).

Although the district court paints the anticompetitive injury as occurring far in the future, in fact the conspiracy *today* forecloses reserves that VVL wishes to purchase. Any mining firm needs reserves to plan for the future. Indeed, the Supreme Court has stressed that the best measure of mining company's competitive strength is *not* its current production but its access to the uncommitted reserves necessary to make new long-term contracts. *United States v. General Dynamics Corp.*, 415 U.S. 486, 502 (1974). Grace's internal memos likewise agree, "A mining company is only as valuable as the reserves it controls." SJ Opp. Ex. 9 at G008601. Denying access to the reserves necessary to secure the long-term future profit stream of VVL thus lowers the current value of VVL. *See, e.g., Albrecht v. Herald Co.*, 452 F.2d 124 (8th Cir. 1971); *Pollock & Riley v. Pearl Brewing*, 498 F.2d 1240, 1245 (5th Cir. 1974) (same).

Further, lost profits are often awarded for periods far in the future. *Johnson v. Orowheat Foods*, 785 F.2d 503 (4th Cir. 1986) (awarding 21 years of future lost profits); *DeLong Equipment v. Washington Mills*, 990 F.2d 1186, 1203-05 (11th Cir. 1993) (25 years); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 25 (5th Cir. 1974) (13 years); *Whitney Benefits v. United States*, 18 Ct. Cl. 394 (1989), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991) (57 years).

The district court's new rule of law also would have disastrous policy implications. It would effectively immunize any defendants who restrain access to resources their rivals need for long term planning. Declaring open season on a rival's ability to make long term plans is hardly a recipe for healthy competitive markets.

Finally, the district court ignored the "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury." *J. Truett Payne & Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565 (1981). This antitrust doctrine exists for the very good reason that antitrust defendants should not be permitted to profit from the uncertainty created by their own antitrust violations. *Simpson v. Union Oil Co.*, 396 U.S. 13, 16 (1969) (Black, J. concurring in relevant part) ("In this very antitrust field our Court has specifically and pointedly refused to permit antitrust violators to escape liability for their wrongs on the argument that damages must not be awarded because they are uncertain and speculative."); *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Zenith*, 395 U.S. at 124.

Accordingly, it suffices that some "reasonable inference" can be made about VVL's future profits damages "although the result be only approximate." *Story Parchment*, 282 U.S. at 563; *J. Truett*, 451 U.S. at 565-66; *Zenith*, 395 U.S. at 123; *Bigelow*, 327 U.S. at 264. Under this standard, lost profits damages have been based on many debatable assumptions about what would have happened absent a restraint, including that the plaintiff would have won the same market share internationally as domestically, *Zenith*, 395 U.S. at 124-25, or made the same profits as another firm, *Bigelow*, 327 U.S. at 259-65. These assumptions are certainly far less certain than VVL's assumption that its own actual profits would continue if it were not cut off from reserves in the future, an assumption specifically allowed by precedent. *Bigelow*, 327 U.S. at 259-65 (reversing court that declined to assume past profit levels would have continued absent the restraint); *Kodak*, 273 U.S. at 379 (allowing same assumption); *Story Parchment*, 282 U.S. at 562-66 (same).

Recall that Grace based its entire conspiracy on a 20-year estimate of future profits, which Grace concluded had an after-tax present value of $1.5 million. 144 F. Supp.2d at

569, 573. (JA 612, 605). It would be a perversion of justice to say VVL cannot estimate its damages with the same sort of future profit stream analysis that motivated Grace to inflict the restraint of trade. VVL should thus have been awarded the present value of its future lost profits, which were $3,191,823.

B. Where No Adequate Remedy at Law Exists, Injunctive Relief Must Be Ordered.

Even if the district court were correct that future profits damages were too speculative to award, it plainly erred in concluding that this also meant it should deny injunctive relief. 144 F. Supp. 2d at 600. (JA 625). To the contrary, the fact that damages were denied as too speculative meant VVL had no adequate remedy at law, and was thus entitled to injunctive relief. As Judge Posner explained in a recent opinion:

> Even though . . . the district judge was correct that [plaintiff] has failed to come up with evidence that would authorize an award of damages . . . this does not justify withholding an injunction--rather the contrary. Inadequacy of a plaintiff's remedy at law, that is, his damages remedy, is normally . . . a prerequisite to the entry of an injunction. And a common reason why the damages remedy is inadequate is that the plaintiff is unable to quantify the harm that the defendant's practice has inflicted or will inflict on him.

Blue Cross v. Marshfield Clinic, 152 F.3d 588, 591 (7th Cir.1998).

The district court's trial opinion thus had matters precisely backwards when it ruled that the speculative nature of future lost profits required denying injunctive relief. Injunctive relief would eliminate any of the

speculation that might otherwise attend an award of future profits damages. With the vermiculite reserves in hand, VVL would receive precisely the future profits it would have received had Grace sold them to VVL, no more or less. Indeed, this trial conclusion oddly contradicted the district court's own prior ruling at summary judgment, which correctly held injunctive relief for lost profits was not defeated by their speculative nature, 108 F. Supp. 2d at 602-03 (JA 288), and should have been treated as the law of the case.

Further, Supreme Court precedent provides that "a remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct' [and] . . . deny to the defendant the fruits of its statutory violation." *United States v. Microsoft*, 253 F.3d 34, 102 (D.C.Cir.2001) (en banc) (citing *Ford Motor v. United States*, 405 U.S. 562, 577 (1972), and *United States v. United Shoe*, 391 U.S. 244, 250 (1968)). Here, both reasons to award injunctive relief are present.

Injunctive relief ordering HGSI to transfer its acquired property to VVL is necessary to unfetter the Virginia reserves market from the anticompetitive foreclosure created by the Grace-HGSI conspiracy. The fact that VVL may not run out of reserves for 11 years does not eliminate the need for such injunctive relief. Indeed, in *Ford Motor* the Supreme Court awarded injunctive relief designed to affect how the market would look like ten years in the future, and stressed that drafting an antitrust decree by necessity "involves predictions and assumptions concerning future economic and business events." 405 U.S. at 578.

Likewise, an injunction ordering HGSI to transfer its acquired property to VVL is also necessary in order to deny HGSI the fruits of its illegal conspiracy. As the U.S. Supreme Court stated, an injunction ordering divestiture of property is appropriate:

> if the property was acquired . . . as a result of practices which constitute unreasonable restraints of trade. Otherwise, there would be reward from the conspiracy through retention of its fruits. Hence the problem of the District Court does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved. . . . [T]he requirement that the defendants restore what they unlawfully obtained is no more punishment than the familiar remedy of restitution.

United States v. Paramount Pictures, 334 U.S. 131, 171-72 (1948).

Finally, the only reason that the conspiracy did not already cause VVL to exhaust its reserves is that VVL first pursued state litigation that successfully freed many properties. VVL should not be penalized because it pursued litigation in stages, nor barred in this litigation from completing the freeing of properties VVL began in that state litigation.

If VVL is awarded injunctive relief, it is also entitled to attorney fees and litigation costs. *Blue Cross*, 152 F.3d at 595.

C. At the Very Least, the Donations from Grace to HGSI Should Be Rescinded.

As addressed above, the district court acknowledged that today "a substantial portion of the merchantable Virginian vermiculite reserves is foreclosed by the" Grace-HGSI conspiracy. 108 F.Supp.2d at 575. (JA 266). If the above requested injunctive relief is not granted, this Court should, at the very least, order the rescission of the transfer

of properties from Grace to HGSI. If rescission is granted, VVL will have the opportunity to mine the property pursuant to the terms of the settlement agreement with Grace. (VVL is prohibited by the terms of the settlement agreement from disclosing the process by which VVL will obtain the property, unless the Court orders disclosure.) Failure to grant this very minimal relief would allow HGSI to continue to benefit from its antitrust and Virginia Conspiracy Act violations. Such injustice cannot stand.

Conclusion

For the above reasons VVL respectfully requests that this Court grant the following relief:

1. Enter judgment that HGSI violated the Virginia Conspiracy Act, and/or Sherman Act §1, and/or Virginia Antitrust Act §59.1-9.5, and must reimburse VVL for its attorneys' fees and litigation costs, in an amount to be determined by the lower court; and/or

2. Enter an injunction requiring HGSI to transfer the property it acquired from Grace to VVL; and/or

3. Enter a judgment for past transportation damages of $1,245,941, trebled to $3,737,823; and/or

4. Enter a judgment for past and future transportation damages of $3,947,014, trebled to $11,841,042, and future lost profits of $3,191,823, trebled to $9,575,469.

5. Enter an injunction rescinding the transfer of the properties from Grace to HGSI; and/or

6. Reverse the district court's ruling in so far as it failed to award nominal damages to VVL for the Grace/HGSI conspiracy in violation of the Virginia Conspiracy Act. Enter judgment in favor of VVL for nominal damage and remand this case to the district court for assessment of attorney's fees and costs; and/or

7. Reverse the ruling of the district court regarding the application of the "abbreviated" Rule of Reason analysis. Remand the case to the district court for application of the "abbreviated" Rule of Reason analysis with an order that the HGSI/Grace conspiracy had obvious anticompetitive effects.

Request for Oral Argument

VVL respectfully requests oral argument.

VIRGINIA VERMICULITE, LIMITED

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01-1850(L), 01-1925 XAP

In The
United States Court of Appeals
For The Fourth Circuit

VIRGINIA VERMICULITE, LIMITED,
Plaintiff - Appellant/Cross-Appellee,

v.

THE HISTORIC GREEN SPRINGS, INCORPORATED,
Defendant - Appellee/Cross-Appellant,

W.R. GRACE & COMPANY-CONNECTICUT,
Defendant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF VIRGINIA AT
CHARLOTTESVILLE

BRIEF OF APPELLEE/CROSS-APPELLANT

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* * *

[Filed November 29, 2001]

Opening Brief
for appellee/cross-appellant
The Historic Green Springs, Inc.

This Brief, on behalf of The Historic Green Springs, Inc. (HGSI) responds to appellant Virginia Vermiculite, Ltd's (VVL's) opening brief, and pursuant to this Court's scheduling orders, constitutes the opening Brief of HGSI's cross-appeal (no. 01-1925). In response to VVL's appeal, and as shown herein, this Court should affirm the judgment of the District Court. In that event, this Court need not reach any of the issues raised by HGSI in its protective cross-appeal.

I. Statement of Jurisdiction

This Court has appellate jurisdiction under 28 U.S.C. §1291 over HGSI's cross appeal by reason of HGSI's timely notice of appeal filed on July 6, 2001.

II. Statement of Issues

A. VVL's Appeal

VVL's issues boil down effectively to just two:

1. Whether the District Court below erred in granting summary judgment under the Rule of Reason against VVL's Sherman § 1 claim, unsupported by any expert economics testimony, that Grace and HGSI had somehow acted in restraint of trade in an alleged vermiculite ore market confined to Louisa County, Virginia?

2. Whether the District Court erred in finding, after an eleven day bench trial, that VVL had failed to establish causation for purposes of its state law claim under the Virginia Civil Conspiracy Act (VCCA), Va. Code § 18.2-499-500, much less Sherman Act causation or antitrust injury?

VVL's issues in connection with damages and injunctive relief, which as to some matters were resolved at summary judgment, and as to others at trial, need not be resolved since there is no liability.

B. HGSI's Cross-Appeal

As already noted, the issues below need only be reached if this Court fails to affirm in response to VVL's appeal.

(a) If the trial court found a "tort" was committed, whether any such finding was error, and in any event, whether the trial court erred in concluding that Grace breached a duty to the Peers in donating property in question to HGSI when, among other things, Grace first offered to sell the property in question to VVL, but VVL elected to pursue other options?

(b) Whether the District Court erred in granting summary judgment against HGSI's First Amendment defenses and related defenses, other than Noerr-Pennington defenses?

(c) Whether the trial court erred in failing to permit certain discovery, in excluding relevant evidence, and otherwise in constricting HGSI's presentation of its defense on issues such as intent, malice, justification, damages and antitrust injury?

(d) Whether the District Court erred at summary judgment in failing to consider expert evidence that, inter alia, alternative land uses must be taken into account as part of the relevant market for purposes of evaluating VVL's antitrust claims?

III. Statement of the Case

Green Springs Landmark The Virginia Department of Historic Resources (DHR) nominated the Green Springs area of Louisa County to the Virginia Historic Landmark

Commission as Virginia's first rural historic district.[1] The Landmark Commission designated the Green Springs district a "landmark" for the Virginia Landmarks Register on February 20, 1973.[2] On DHR's nomination, the U.S. Interior Department listed the Green Springs district on the National Register of Historic Places. The National Park Service subsequently designated the Green Springs district a National Historic Landmark. Through litigation, VVL (as an intervenor) sought to invalidate this designation (see The Historic Green Springs v. Bergland, 497 F.Supp. 839 (E.D. Va. 1980)), but Congress quickly ratified its Landmark status. 16 U.S.C. § 470a(a)(1)(B), as amended by P.L. 96-515 (Dec. 12, 1980). See J.A. 1209 & 1225.

William Bolger, testifying for the National Park Service, explained at trial that the Green Springs National Historic Landmark is 'nationally significant on a par with national parks" and it is considered "part of the national park[s] [system] itself." J.A. 763-64 (emphasis added). Green Springs was recognized

> "for its outstanding merits and agricultural history and the assemblage of architectural components. It's a historic district not unlike Charleston or Savannah historic district[s], [except] this one ... [is] rural." J.A. 759.

The National Park Service (J.A. 1209) and two Virginia state agencies (DHR, J.A. 739, and Virginia Outdoors Foundation, J.A. 769) manage conservation easements barring industrial

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1 J.A. 737-40 (Calder Loth expert testimony), DTX 91.

2 See Virginia Historic Landmarks Commission v. Board of Supervisors, 217 Va. 468, 230 S.E.2d 449 (1976). Calder Loth, an expert on Virginia architecture, architectural history, and historic preservation, provided unrebutted expert testimony at trial that the Landmark continued to merit this listing. J.A. 751.

development, including mining, as well as intense residential development with respect to the bulk of the Landmark.

Vermiculite. Vermiculite is a micaceous mineral with many uses, for all of which there exist a variety of substitutes. The major substitutes are other lightweight aggregates, including polystyrene, perlite, wood bark, mineral wool, and so on.[3] The U.S. Geological Survey indicates that vermiculite reserves and resources are abundant.[4] Indeed, vermiculite reserves and resources "can essentially be regarded as unbounded." DTX 96 at J.A. 1388. The major producer internationally is Palabora (related to Rio Tinto) out of South Africa, which produces a vermiculite better in quality (more expandable, less contamination, and with a greater range of sizes) than is available domestically.[5] Imports of vermiculite have expanded greatly this past decade. 144 F.Supp.2d at 610 (table) (J.A. 979-80).

There is a deposit of vermiculite in and adjacent to Green Springs National Historic Landmark. Vermiculite in the Landmark is mined by means of pitmining.

The Advisory Council on Historic Preservation has determined, pursuant to the requirements of the Mining in the Parks Act, that vermiculite mining threatens the integrity of the Landmark. JA. 1187-88 (DTX 33). Pursuant to federal regulations, this can result in loss of the Landmark. 36 C.F.R. § 64.9(b)(1). See also J.A. 1403-05 (DTX 119, NPS concerns about mining in the Landmark).

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3 E.g., J.A. 1125-38 (Ellicott); DTX 96 at J.A. 1368 (Roskill); J.A. 435-36, ¶24 & n.24 (Goetz); J.A. 1335 & 1336 (DTX 95, USD01: competition from other materials).

4 E.g., J.A. 1043-44 (Godek); 1120-21 (Ellicott); 1358 (Roskill).

5 J.A. 445 (Ellicott) at ¶5 (b); J.A. 1125-26 (Ellicott). This gives South African vermiculite a price advantage. See id.

HGSI. HGSI is a small, non-profit, § 501(c)(3) organization, without paid staff or officers, which, pursuant to a cooperative agreement (J.A. 1231-36) with the National Park Service entered under the Historic Sites Act of 1935 (id. 1231-32), works to foster the preservation of the Landmark. HGSI is thus similar to many other land trusts which focus on preserving or protecting a particular civil war battlefield, historic district, wildlife habitat, or park. HGSI does not mine or mill vermiculite. Rae Ely, a Louisa attorney who has received national recognition for her work on historic preservation (T.T. 1649), is currently the president of HGSI.

VVL. VVL is a limited partnership, whose principal is Robert Sansom, a D.C. area consultant. VVL, like Grace, has vermiculite mines and a mill in South Carolina. VVL also operates a mine and a mill inside the Green Springs National Historic Landmark.

Former defendant W.R. Grace. In the early 1990's, Grace owned outright several properties in the Landmark, although it believed that only one (the former A.D. Peers property) contained commercial quantities of vermiculite.[6] Grace also owned several mining leases in the Landmark, on which it had made more than $1,000,000 in advance royalty payments. See note 6 (DTX 134 & 138 set forth expenditures)

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[6] Mr. Hash, responsible for drilling in Green Springs. on behalf of Grace and later VVL's first president, repeatedly indicated that the M.F. Peers property did not contain commercial quantities of vermiculite. The following citations are to portions of the Hash deposition, designated for purposes of the trial: 7/15/99 dep. at 117:2-21; 7/16/99 dep. at 195:12-196:11, 196:25-197:2, 302:18-303:25 and 359-77 (esp. 359-60, 367, 371-73). Accord, Lyall Dep. 141:18-143:9 (Peers told he had no commercial ore); DTX 147 (1972 memo: Grace interested in M.F. Peers property as site for mill and tailings ponds). See also DTX 134 at J.A. 1408 (listing reserves calculated by Grace showing no amount for M.F. Peers); DTX 138 at J.A. 1420 (same); PTX 46 (stipulation 24: Grace purchased land that did not contain vermiculite reserves because of the land's logistical benefit to Grace's planned future operations).

Grace also produced products (such as building products) using vermiculite. In the late 1980's and early 1990's, Grace shifted to substitutes (primarily polystyrene) for some of its products previously dependent upon vermiculite. Grace shut down its large Libby, Montana mine and plant, ceasing shipments in 1992. VVL contends that Grace shut down its Libby operations due to asbestos contamination.[7] Grace consolidated its remaining vermiculite mining and milling to South Carolina. Grace, which had originally planned a third mill in Virginia (PTX 46: stipulations 23 & 24), viewed its Virginia reserves, located in the northern portion of Green Springs National Historic Landmark, as excess to that company's needs.

In 1991, Grace offered to sell all of its Virginia properties, including fee-owned parcels as well as mining leases with around $1,000,000 in advance royalties, to VVL. See 144 F.Supp.2d 558, ¶¶ 91-135, J.A. 946-49. After initially offering $1.75 million for these properties, VVL placed a series of caveats and requirements (including some financing by Grace) upon its proposal to Grace which effectively cut VVL's offer to a level less than $1.5 million. VVL's Robert Sansom made clear that the offer was final, as VVL intended to pursue other options. Grace concluded that VVL would not or could not come to terms. Both VVL and Grace then withdrew their offers. VVL did not pursue the matter with Grace again. As the District Court concluded in its Findings of Fact after trial, VVL pursued a self-defeating negotiating strategy:

> Dr. Sansom's firm negotiating position was the principal cause of the failed negotiations between Grace and VVL."

F.F. ¶ 134.

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[7] E.g., Daubert hearing, 6 March 00 transcript at 56, lines 2-6 (VVL witness Schwartz asserts Grace closed Libby due to asbestos contamination).

Donation. Since its inception in the early 1970's, HGSI has sought donations of land or interests in land in and adjacent to the Landmark. Since VVL was unable or unwilling to acquire the properties in question, Grace subsequently reached an agreement to transfer the properties to HGSI in return for tax benefits, favorable publicity, and a reduction in Grace's on-going managerial costs. E.g., DTX 124 & PTX 327 (Grace press release); PTX 46 (stipulations 78 & 92: tax deductions for donations); J.A. 803 (HGSI understanding). Grace's donation was consonant with requests from the U.S. Department of Interior (DTX 106, 1LA. 1401, Letter to Mr. Grace) and enjoyed the support of representatives of the Virginia Outdoor Foundation who were consulted prior to the donation. J.A. 775 (Van Auken testimony).

Two of the parcels owned in fee by Grace are particularly important for this appeal: the former M.F. Peers parcel, and the former A.D. Peers parcel.

Grace, which did not believe the former M.F. Peers parcel contained commercial vermiculite (see sources in note 6), donated that property to HGSI in 1992. The M.F. Peers parcel includes land adjacent to the South Anna River over which VVL claims to wish to construct some kind of off-road transport facility for ore and waste product between its current mill site and mine site, parallel to the nearby public road (Route 22) it has heretofore used. VVL approached HGSI for crossing rights in December 1992, offering $36,000. PTX 16. However, VVL also indicated that it would have to check with the Corps of Engineers regarding wetlands regulation (e.g., DTX 17, J.A. 1168 (VVL letter to Louisa County)). HGSI promptly authorized VVL to enter with a representative of the Corps of Engineers to examine routes. PTX 20. VVL did not get back to HGSI until approximately two years later, when VVL again raised the subject, indicating to HGSI in November 1994 that it was considering either a road or a conveyor, but had not made

up its mind. E.g., PTX 13 (Gumble notes of meeting with Ely); Tr. Tr. 998:12 & 429:12 et seq. Rather than decide on what it wanted and make an offer, VVL in early 1995 elected instead to pursue this lawsuit unless HGSI would consent to allow VVL to mine HGSI property. VVL now asserts $3,947,014 in alleged off-road haul damages (VVL Brief at 79) [8]

The M.F. Peers donation included a restrictive covenant, barring mining and other industrial development, because of advice to Grace by Tyson Van Auken, Executive Director of the Virginia Outdoors Foundation, who felt such covenants ensured a tax deduction and also were consistent with donations for public interest purposes.[9]

Grace donated the former A.D. Peers property to HGSI in 1994. Grace's agreement with A.D. Peers provided that Mr. Peers could repurchase some 37 acres in the event Grace elected to sell the property rather than mine it. Grace allowed Mr. Peers to repurchase the 37 acres prior to donating the remainder of the former A.D. Peers parcel to HGSI. That donation did not include any covenant barring mining.

In 1993, HGSI as assignee of a Grace lease brought a suit against one of its lessors, in which VVL intervened. Grace was not a party. VVL sought an invalidation of the entire lease, on the theory that the assignment of a mining lease by Grace to HGSI with a restrictive covenant breached an implied covenant of good faith. After a trial, the circuit court, unaware of that Grace had offered the lease (along with all its Louisa holdings) to VVL in 1991, ruled that

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8 This amount is over 100 times VVL's unpursued 1992 offer to HGSI.

9 J.A. 771 & 779 (Van Auken testimony); J.A. 693-94 (Favorito Dep.); see also DTX 156 & .157 (copies of draft conservation easements barring mining and other industrial activities sent by Van Auken to Grace).

although Grace had no duty to mine, an assignment of the lease with such a restrictive covenant did breach an implied duty of good faith. The circuit court also found, however, no tort had been committed, on the ground that cross-plaintiffs could establish no injury, since Grace had no duty to mine. HGSI v. Brandy Farm, Ltd., 32 Va. Cir. 102 (Louisa Cir. Ct. 1993).

The donation did not affect VVL's access to reserves in South Carolina where VVL operates, or anywhere else in the world where VVL may sometime wish to operate, and VVL neither suggested nor proved that either Grace or HGSI did anything to impact VVL outside Virginia. 144 F.Supp.2d at 594, J.A. 966, ¶¶ 37-39. VVL admits its reserves are adequate in Virginia until 2013 -- for a period longer (see J.A. 1029 (Godek)) than Grace has reserves anywhere in the world. For these and other reasons, it is clear that the donation did not restrict the output of vermiculite or any other product in any way.

This litigation. In 1995, VVL brought this lawsuit against HGSI and Grace, alleging that the donations violated Sherman §§ 1 and 2, comparable provisions of the Virginia antitrust statute, and the Virginia Civil Conspiracy Act. VVL alleged that HGSI conspired with Grace in restraint of trade (Sherman § 1) in a market defined as vermiculite mining rights in the Landmark, and that HGSI conspired with Grace to monopolize (Sherman § 2) markets for vermiculite concentrate and subgrades thereof in North America. VVL eventually sought over twenty million dollars in damages after trebling.

VVL subsequently brought an action against W.R. Grace & Co. alleging similar claims as assignee of Mr. and Mrs. A.D. Peers, and another action against W.R. Grace & Co. alleging similar claims as partial assignee of claims of Mr. and Mrs. M.F. Peers. Neither of these so-called Peers cases named HG5I as a defendant

Initial dismissal and appeal. Pursuant to motions filed under F. R. Civ. P. 12(b)(6), the District Court initially dismissed HGSI entirely from this proceeding, and Grace from all conspiracy counts, primarily on the theory that HGSI was simply a social action organization doing what such organizations do, and was not engaged in commerce. This Court, however, reversed, ruling that the Complaint alleged a sufficient commercial nexus.

Expert discovery. VVL designated Seth Schwartz, a business colleague of VVL's leader, Mr. Sansom, as its expert economics witness. Mr. Schwartz lacked any degree in economics. HGSI designated Professor David Mills of University of Virginia Department of Economics as its expert economist, and Mr. Graham Ellicott (former head of Palabora's sales unit for vermiculite for North America and Europe and author of the most recent Roskill reports on vermiculite and perlite) as its lightweight aggregate market expert. Grace designated Dr. Paul Godek as its expert economist.

After completion of fact discovery, the case moved on to the expert phase. The parties concluded expert depositions by December of 1999, and on December 22, 1999 both sides moved for summary judgment. VVL moved for summary judgment on its Sherman § 1 claim, and against certain HGSI defenses, including HGSI's First Amendment defenses. HGSI and Grace moved for summary judgment against all VVL's claims.

Motion to exclude under Daubert. HGSI also moved to exclude the testimony of Mr. Schwartz on the ground that he did not meet the criteria set forth in F. R. Ev. 702 as applied in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). J.A. 476, et. seq. In particular, HGSI argued that Schwarz did not employ methodology comporting with economic science. E.g., J.A. 487-98. Grace

orally joined the motion at a hearing on February 19, subsequently filing relevant papers.

The District Court conducted four days of hearings (March 6, and March 29-31, 2000) on the HGSI/Grace motion to exclude, taking testimony from Mr. Schwarz, HGSI expert economists Professor David Mills and Professor Charles Goetz (Professor Goetz is an economist who teaches at the University of Virginia Law School), and Grace expert Professor Hay (Cornell University). The Court also received reports and affidavits from Dr. Godek (for Grace) and Mr. Graham Ellicott (for HGSI).

The evidence on which Mr. Schwartz relied for purposes of the claim that the donation was or should be viewed as anticompetitive, or that VVL's evidence could prove any of the markets which it alleged, was discussed at length in the Daubert proceeding. That evidence is the same evidence as VVL relies on in its Opening Brief in this Court. The defense experts explained in detail, and under cross examination, why it would be error, as a matter of economic science, to draw the conclusions which Mr. Schwarz and VVL seek to draw from that evidence.

On May 20, 2000, the District Court issued an opinion, reported at 98 F.Supp.2d 729 (J.A. 297-317), granting HGSI's motion to exclude the report and testimony of VVL's only proposed expert on antitrust economics. VVL does not contest that exclusion in its Brief.

The remaining experts (all for the defense) supplied evidence explaining at length that the evidence on which VVL relies does not establish the existence of an antitrust relevant market, or of any anticompetitive effect in any market.[10]

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[10] E.g., J.A. 212-16 (Mills testimony); 466-67 (Godek affidavit); 1030-43 (Godek Report); 402-06 (Mills aff.); 431-37 (Goetz aff.); 274-95 (Goetz testimony).

Summary judgment. After excluding Mr. Schwartz, the District Court heard oral argument on the pending summary judgment motions, resolving them in a lengthy opinion issued on July 26.

The District Court denied VVL's motion for summary judgment on Sherman § 1. VVL conceded that nothing in the donation amounted to a per se violation of the Sherman Act. However, VVL nonetheless argued that showings required under the Rule of Reason (i.e., the existence of an antitrust relevant market and market power, or anticompetitive effect) were not required as a matter of law. VVL argued that an "abbreviated Rule of Reason" analysis should be applied under which HGSI must be presumed liable unless HGSI proved that the donations were pro-competitive. VVL urged that donations for historic preservation reasons a fortiori could never be pro-competitive, so HGSI must lose without VVL having to show anything; ergo summary judgment for VVL.

The District Court, well-informed by four days of Daubert hearings, ruled that the "quick look" doctrine for which VVL argued for Sherman § 1 purposes was not applicable, and that under the traditional Rule of Reason analysis, VVL could not bear its burden of proof, particularly since VVL had no expert economics witness to rebut the testimony of the defense experts, or otherwise to establish an antitrust relevant market or evaluate anti-competitive impact in that market. VVL appeals this portion of the summary judgment.

The District Court granted summary judgment for Grace on the monopolization and attempt to monopolize claims under Sherman § 2 for reasons similar to those employed with respect to VVL's Sherman § 1 claim.

The District Court rejected HGSI's request for summary judgment on VVL's conspiracy to monopolize (Sherman § 2) claim. The District Court ruled that VVL

need not show that a conspiracy to monopolize was intended to effect an antitrust relevant market, or could do so.

The District Court granted VVL's motion for summary judgment against certain of HGSI's defenses, including HGSI's First Amendment defenses, except for Noerr-Pennington, viewing those defenses as inapplicable to federal antitrust claims.

The District Court denied summary judgment on VVL's Virginia Conspiracy Act counts.

Pre-trial. VVL, Grace and HGSI all waived jury trial, and consented to a bench trial before the U.S. District Court, Judge Michael presiding. In an effort to shorten the trial, and without admission of liability, HGSI offered to submit to binding arbitration of terms and conditions for "off-road haul," the only remaining claim of damages presented by VVL. The District Court treated this offer as a settlement offer, and directed the Magistrate to conduct settlement negotiations. In consequence, defendant W.R. Grace & Co. -- Conn. settled with VVL and the so-called Peers plaintiffs on the opening day of trial. This ended both the so-called Peers cases, for HGSI was not a defendant in either suit. Grace was also dismissed from this proceeding.[11]

Trial. This case proceeded to an eleven-day trial with VVL as the sole plaintiff and HGSI as the sole defendant in October 2000. The District Court, after due consideration of the evidence and briefs, issued an extensive set of findings and conclusions, published now at 144 F.Supp.2d 588.

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[11] Grace subsequently filed a voluntary Chapter 11 bankruptcy petition "in response to a sharply increasing number of asbestos claims." Grace Press Release, April 2, 2001.

The District Court concluded that VVL had failed to prove the specific intent required to establish a violation of the conspiracy portion of Sherman § 2; namely, an intent on the part of the parties to monopolize an appreciable segment of commerce. The District Court also concluded that VVL had failed to show that the alleged conspiracy caused any antitrust injury, much less injury-in-fact (a basic requirement for proof of any tort) to VVL. For similar reasons, the District Court concluded that VVL had failed to show causation for Virginia Conspiracy Act purposes. The Court issued judgment for HGSI.

VVL does not appeal the Court's trial finding of no liability for conspiracy to monopolize in violation of Sherman § 2. VVL does appeal the Court's trial conclusions of no injury in fact (causation) or antitrust injury for purposes of both Sherman § 2 (which VVL evidently assumes would be the same for Sherman § 1) and no injury in fact for purposes of the Virginia Conspiracy Act.

IV. Summary of Argument

A. VVL Appeal

Sherman § 1. VVL relies on the same evidence and flawed methodologies for the same faulty conclusions as its excluded expert Schwartz. If the conclusions are inconsistent with economic science when voiced by a putative expert, they are not healed when voiced by lawyers writing VVL's brief. Moreover, defense expert economists stand unrebutted in their testimony that VVL has failed to establish any antitrust relevant market, any market power, or any anticompetitive effect. Under the Rule of Reason, VVL thus failed to bear its burden. As below, VVL urges application of an "abbreviated" Rule of Reason, under which economic effects and for that matter economic science would be ignored, and anticompetitive effect would be presumed. But "departure from the Rule of Reason must be based upon demonstrable economic effect rather than . . .

upon formalistic line drawing." State Oil Co. v. Khan, 522 U.S. 3, 14, 118 S.Ct. 275, 281 (1997), quoting Continental T.V. v. GTE Sylvania, 433 U.S. 36, 58-59, 97 S.Ct. 2549, 2562 (1977).

Causation. The trial court properly held that VVL failed to show that the donation caused harm to VVL. Grace offered the property in 1991 to VVL, but VVL made an inadequate offer and then decided to pursue other opportunities. VVL failed to show that but for the donation, Grace would have sold the property to VVL. These findings are not clearly erroneous. Moreover, the evidence indicated plentiful alternative reserves and ample substitutes for vermiculite. For this and other reasons, there was no showing of injury to competition. Finally, under the Virginia Conspiracy Act, VVL also failed to show "but for" causation, and in any event, liability must be predicated upon an actionable legal wrong, of which VVL can demonstrate none germane to it.

B. HGSI Cross-Appeal

The errors presented in HGSI's cross-appeal are harmless and need not be addressed if this Court rejects the positions taken by VVL on its appeal.

1. If, as VVL claims, the trial court found that a tort had been committed, the court erred. In any event, in drawing its conclusions with respect to alleged breach of implied covenants of good faith to the Peers, the trial court among other things ignored its own findings that Grace had offered to sell the properties to VVL but VVL through its own intransigence caused the negotiations to fail.

2. The District Court erred in granting summary judgment against HGSI's First Amendment and related defenses, which are clearly applicable to Virginia Civil Conspiracy Act claims.

3. The trial court erred in excluding expert evidence germane to antitrust injury at trial, and in curtailing discovery and submission of evidence on asbestos contamination of vermiculite ore in Green Springs. This latter evidence is unquestionably relevant to issues of intent, malice, causation and damages.

4. The District Court erred at summary judgment in ignoring expert evidence that alternative land uses must be considered in determining relevant market for purposes of Sherman § 1.

V. Argument

A. The District Court Properly Granted Summary Judgment to HGSI under Sherman § 1

1. Standard of Review and Its Application under Rule 56

The standard for review of a summary judgment in general is de novo, but in all events plaintiff-appellant VVL has the burden of proof. See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). No one claims a per se violation of Sherman § 1 occurred in this case. Absent a per se violation, "there is a presumption in favor of a rule-of-reason standard." Business Elec. Corp. v. Sharp Elec. Co., 485 U.S. 717, 725, 108 S.Ct. 155 (1988); quoted in Nova Designs, Inc. v. Scuba Retailers Ass'n, 202 F.3d 1088, 1091 (9th Cir. 2000).

In a Rule of Reason case, the threshold inquiry on which VVL has the burden is whether defendant had market power, and to prove market power, "plaintiff must first establish the relevant product and geographic markets." See, e.g., Murrow Furniture v. Thomasville Furniture, 889 F.2d 524, 528 (4th Cir. 1989). If there is no market power, an alleged restraint cannot restrain trade, i.e.,

be anti-competitive.[12] In other words, a "Rule of Reason" claim under Sherman § 1 requires analysis of the effect of the alleged restraint upon overall competition in a relevant market. Stearns v. Genrad, 564 F.Supp. 1309, 1313 (M.D. N.Car. 1983), aff'd, 752 F.2d 942 (4th Cir. 1984). To show an effect, plaintiff bears the burden of proving a relevant product market and a relevant geographic market. Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Va., Inc., 714 F.2d 351, 355 (4th Cir. 1983). See also Military Serv. Realty v. Realty Consultants of Va., 823 F.2d 829, 831-32 (4th Cir. 1987)

Under M&M Medical Supplies v Pleasant Valley Hospital, 981 F.2d 160 (4th Cir. 1992) (a case on which VVL relies), if a trial court is dubious of the underlying rationale for an expert economics opinion, it may require disclosure of underlying data:

> "[n]either Fed. R. Civ. P. 56(e) nor Fed. R. Evid. 705 places any limitation on a court's authority to require an expert to disclose supporting data in any pretrial proceeding, including one for summary judgment." 981 F.2d at 165-66.

The District Court did exactly that, in response to a motion to exclude VVL's Seth Schwartz pursuant to Daubert, supra.

The District Court conducted a four day Daubert hearing, testing among other things the economic validity of theories advanced by Schwartz (and now again by VVL's lawyers in their opening brief) that (1) that VVL has borne

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[12] Because market power is difficult to prove, it is generally inferred based on a showing of the share of an antitrust relevant market controlled by the antitrust defendants. H. Hovenkamp, Federal Antitrust Policy 82 (1994). This in turn requires proof of a market in which the restraint occurred. See, e.g., Murrow Furniture Galleries v. supra, 889 F.2d at 528.

its burden to show the existence of antitrust relevant markets for Rule of Reason purposes, and (2) the donation was somehow a manifestly anticompetitive device appropriate for a truncated review under the Rule of Reason. Defense expert economists indicated that, under economic science, Mr. Schwartz could not properly draw the conclusions which he purported to draw from the "facts" on which VVL relied below (and relies here).[13] In response to that hearing, the District Court excluded Mr. Schwartz and his testimony as methodologically flawed. VVL's effort to revisit these decisions cannot survive the fate of its expert witness, Seth Schwartz.

All the economics experts in the case testified in favor of Grace and HGSI. They explained that, as a matter of economic science, the donation was not manifestly anticompetitive, or somehow exemplified monopoly power.[14] This bars application of "naked restraint" theory, unless economic impact is now to be ignored, and thus blocks summary judgment for VVL.

VVL fares no better in opposing summary judgment for HGSI. HGSI argued for summary judgment under Rule 56 on the ground that VVL could not show the required elements of its case (e.g., market and market power under the Rule of Reason). In order to avoid summary judgment, VVL must show a "genuine issue." But a genuine issue is "more than simply . . . some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.C. 1348, 1356 (1986). Here, the expert testimony renders all VVL's arguments

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13 E.g., Mills Affidavit, J.A. 400-17; Godek Affidavit, J.A. 465-71; Goetz Affidavit, J.A. 425-441. Mr. Schwartz was also a colleague of VVL's principal (Mr. Sansom) in a consulting business, and lacked either an undergraduate degree in, or any graduate training in economics.

14 E.g., Mills Aff. J.A. 407-09 (¶¶22 & 25-26); Goetz Aff. J.A. 438-40 (¶¶27-30).

metaphysical. The defense experts testified that the evidence on which VVL relies does not prove a relevant product market, or geographic market, or existence of market power as a matter of economic science.[15] This in turn bars recovery under Rule of Reason. The inferences VVL seeks to draw are contrary to the only expert evidence offered in the case, and are thus speculative and conjectural -- insufficient to sustain an issue before the trier of fact. See Thompson Everett, Inc. v. National Cable Advertising, 57 F.3d 1317, 1323 (4th Cir. 1995) (summary judgment may not be defeated on the basis of speculation or conjecture).[16]

The Supreme Court has indicated that "antitrust law limits the range of permissible inferences from ambiguous evidence . . ." Matsushita, supra, 474 U.S. at 588, 106 S.Ct. at 1356. VVL cannot defeat summary judgment, much less claim a right to summary judgment, in the face of the expert economic testimony, with no expert testimony of its own. Compare Military Serv. Realty v. Realty Consultants of Va., supra, 823 F.2d at 832 (summary judgment for defendants where plaintiff has no credible expert testimony on relevant market or anticompetitive effect). If as a matter of economic science a conclusion cannot be drawn from the facts alleged by VVL, and defendants so establish by unrebutted expert testimony, then the conclusion cannot legitimately be drawn by a trier of fact.

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[15] E.g., Godek aff. at J.A. 466-68 (¶¶ 6-12) (Jt. Appendix inadvertently omits key portions); Mills & Goetz, note 13.

[16] A genuine dispute is created only if the non-moving party produces evidence creating a "fair doubt.... [W]holly speculative assertions will not, suffice. A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes." Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985), quoted with approval in Catawba Indian Tribe v. State of South Carolina, 978 F.2d 1334, 1339 (4th Cir. 1992).

2. VVL's Sherman §1 Arguments Have No Merit under the Traditional Rule of Reason

For purposes of its Sherman § 1 claim, VVL defined the relevant antitrust product market as vermiculite mining rights, and the relevant antitrust geographic market as Louisa County, Virginia. At summary judgment, VVL presented no expert economics testimony to support the market which it alleged, nor could it, because its only putative expert on the issue was excluded, in a ruling VVL does. not challenge. Virginia Vermiculite, Ltd. v. W.R. Grace & Co., 98 F.Supp.2d 729 (W.D.Va. .2000). As a practical matter, this disposes of VVL's claims under the Rule of Reason, for VVL had no experts to rebut defendants' economists (Dr. Godek and Professor Mills).

If, as here, expert economists find the evidence methodologically inadequate to support a conclusion, that evidence cannot possibly be adequate to support a jury conclusion on the same topic. Accord, In re Aluminum Phosphide Antitrust Litigation, 893 F.Supp. 1497, 1507 (D.Ks. 1995). VVL's disability is fatal to VVL's ability to present a case either under full Rule of Reason analysis, or under a truncated Rule of Reason analysis.

The defense experts demonstrated that VVL's alleged markets were not shown on the basis of VVL's evidence, and that VVL failed to show actual (or even theoretical) anticompetitive effect. E.g., notes 10,13, 14 & 15.

Defense experts unanimously concluded that VVL had failed to demonstrate any relevant market, much less a relevant market defined in terms of vermiculite mining rights in Louisa County. The key point is that the evidence showed that VVL's purported market for vermiculite mining rights had no economic significance apart from downstream sales of vermiculite concentrates. Perhaps the most succinct statement of VVL's problem is by Professor

Mills, who filed an affidavit indicating that "[w]hether vermiculite mining rights can be a economics expert to provide rebuttal of the defense expert testimony. 108 F.Supp.2d at 578, J.A. 606.

Moreover, defendants Grace and VVL supplied unrebutted evidence that downstream competition did constrain the price of vermiculite mining rights. E.g., J.A. 607 (Hash notes). VVL provided no competent evidence to the contrary. This is powerful evidence of no anticompetitive effect.

Assuming arguendo in the face of the expert economics testimony that a vermiculite mining rights market has an antitrust significance apart from the sale of vermiculite concentrates and substitutes, VVL's narrow Louisa County geographic market still makes no sense. In Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 495 (4th Cir. 1986), this Court rejected an effort to limit a market to two natural gas fields, where there was no evidence that plaintiff was foreclosed from sources of gas elsewhere in the country. 805 F.2d at 496. "There is no reason to believe that circumstances rendered the two fields around which the instant events occurred economically significant portions of the national market for natural gas." Id.

VVL tries to get around Consul by arguing that since it has the only plant in Louisa County and cannot readily move, a hypothetical monopolist could force it to pay a 5% increase in price for ore at that location. VVL argues that under the DOJ Guidelines, this shows enough "market" to get to a jury.

The cases have uniformly held that where a plaintiff (VVL) voluntarily decides to do business in a particular manner, knowing full well that it is putting itself at the mercy of a particular source of supply, the antitrust relevant market cannot properly be confined to that single supplier's products, but instead must include all other competitive

products (locations) to which the plaintiff could have turned before choosing the location or arrangement that locked itself in. The Third Circuit's decision in Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997), cert. denied, 523 U.S. 1059 (1998), is directly on point. The district court there rejected plaintiff's (a franchisee's) proposed market limited to supplies used in Domino's Pizza stores as impermissibly narrow. The Third Circuit affirmed, explaining that the franchisees had the opportunity to "assess the potential costs and economic risks at the time they signed the franchise agreement." 124 F.3d at 439-40. Here VVL constructed its mill in Louisa County knowing that "only a few of the Virginia deposits [were] not already held by Grace." Virginia Vermiculite, 156 F.3d at 538; see Grace S.J. Ex. 20 at 3-4 (VVL report to investors discussing various interests). VVL entered Louisa County with its eyes open, knowing that control of the deposits at issue here was already in the hands of Grace. Under these circumstances, the relevant market must include, at the very least, all vermiculite reserve opportunities.[18]

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[18] Accord, JA. 611. See Little Caesar Enters. Inc. v. Smith, 34 F.Supp.2d 459, 506, 512 (E.D. Mich 1998) (relevant market includes all opportunities available prior to entering contract); Tominaga v. Shepherd, 682 F.Supp. 1489, 1494 (C.P. Cal. 1988) (same). Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451 (1992) is readily distinguishable. The plaintiffs in Kodak became "locked in" to Kodak without any reason to believe that Kodak would upset their reasonable expectations by using its power over replacement parts to force copier purchasers to obtain service directly from Kodak, thus squeezing out the independent repair providers dependent upon Kodak for parts. In contrast, Grace at no point supplied VVL with vermiculite ore, toll milling, or any other services in Louisa County. Grace induced no conduct by VVL, nor placed VVL in a position of dependence. "The fact that plaintiff chose to operate in a single market ... does not make it a relevant market for antitrust purposes." Re-Alco Indus. Inc. v. National Ctr. for Health Educ., 812 F.Supp. 387, 392 (S.D. N.Y. 1993).

Furthermore, defendants supplied expert evidence that any company interested in mining vermiculite would look at opportunities throughout North America, and indeed world-wide. E.g., J.A. 1138 (Ellicott); 1045 (Godek). It was undisputed that both VVL and Grace mine vermiculite in South Carolina, that another company was in the process of developing a vermiculite mine in Montana),[19] and that mining companies had developed or were developing vermiculite mines in numerous countries, including in countries already increasing their exports of high quality vermiculite to the United States. J.A. 1118-24 (Ellicott); 1041-43 (Godek).

VVL, like its excluded "expert" Schwarz, relies on the Horizontal Merger Guidelines, but, as the District Court found, those Guidelines on their face admonish against "mechanical application." 108 F.Supp.2d at 577, J.A. 606. As the defense experts established at the Daubert hearing, the DOJ Guidelines can no more be applied without the expertise of an economics expert that a book on cancer therapy can be applied without the expertise of an oncologist or skilled surgeon. E.g., J.A. 279-.80 & 428-30 (Goetz: "identification problem" must still be addressed). In short, the Guidelines are to assist experts, but are not a substitute for experts.

3. VVL's Abbreviated Rule of Reason Ignores Economic Reality

In recognition that its position under the Rule of Reason is manifestly untenable, VVL's primary argument is that the District Court had no discretion, and was legally compelled to apply an "abbreviated Rule of Reason analysis" in which relevant market is ignored and anticompetitive effects are presumed. This is an impossible position for VVL to maintain after four days of

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19 E.g., HGSI S.J. Opp. Ex. 13 (Hindman).

Daubert hearing in which expert economists contended unanimously that there was no showing of market nor anticompetitive effect, nor reason to believe there would be an anticompetitive effect. VVL attempts to leapfrog the evidence by an exercise assigning labels and drawing lines. VVL dubs the donation an output restriction, and argues that any output restriction is a "naked restraint," for which a truncated Rule of Reason approach is required as a matter of law. Under VVL's proposed truncated approach, VVL need not show any anticompetitive effect from the alleged restriction, and thus need not show any market or market power. Instead, VVL says the defendants must show that the donation was procompetitive. Under VVL's line drawing approach, no donation (or, for that matter, no transfer -- VVL Brief at 26) for environmental or historic preservation causes can ever be procompetitive. VVL reasons that HGSI therefore must lose and VVL must win automatically. VVL's truncated Rule of Reason as applied here is equivalent to a new per se rule banning donations (or other transfers) for land conservation, wildlife habitat, hunting preserves, or golf courses, on the theory they are all naked restraints on "output."

The Supreme Court has repeatedly expressed concern against departure from the Rule of Reason, demanding that any departure be "based upon demonstrable economic effect" rather than upon "formalistic line drawing." State Oil Co. v. Khan, supra, 522 U.S. at 14, 118 S.Ct. at 281 quoting Continental T.V. v. GTE Sylvania, 433 U.S. at 58-59, 97 S.Ct. at 2562. In this light, VVL's claim is especially suspect; VVL argues that the District Court erred in refusing to engage in formalistic line drawing and insisting instead upon analysis under the Rule of Reason.

All VVL's assertions about output restriction and nakedness are merely partisan characterizations by VVL's attorneys. There was no actual or demonstrable output restriction. Vermiculite reserves and resources are essentially unlimited (e.g., JA 1118 (Ellicott)). Thus, even if one assumes contrary to the record (e.g., id. 1118-19 & 1126-37) and summary judgment findings (J.A. 512-14), that there are no substitutes for vermiculite, and even if (again contrary to the record and findings) VVL were the sole alternative vermiculite producer, the fact remains that VVL has access to vermiculite in South Carolina and elsewhere, the same as Grace or any other entity. Additionally, VVL admits it controls more vermiculite reserves in Virginia than any other mining company -- reserves adequate at least until 2013 in Virginia. Indeed, as Grace's expert pointed out, this amounts to a concession of no anticompetitive effect.[20] And the record is clear that there are ample uncommitted reserves in Virginia not controlled by HGSI (or Grace) which would carry VVL even further into the future. Finally, as HGSI's unrebutted economics expert, Professor Mills, testified, the donation by Grace to HGSI did increase Grace's control over mining rights. The donation "could not have helped Grace 'obtain' a monopoly," and it "could not have furthered" any "monopoly power." E.g., J.A. 407. Accord, J.A. 438-39 (Goetz); 1045 (Godek) (difficult to understand how disposing of property could be a method of acquiring market power over that property). In sum, there really was no plausible theoretic output restriction, let alone an actual or demonstrable output restriction, by reason of the donation. As the District Court properly

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[20] J.A. 1028 (Godek). Ironically, if reserves are not obtainable as VVL implies, then Grace will go out of business first (J.A. 1029), presumably to the benefit of VVL.

found on an ample record, VVL's rhetoric does not track with the economic evidence.[21] VVL is refuted by the unrebutted economics experts.

VVL relies heavily on FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986), for its argument that market and market power need not be shown in the case of an output restriction. While Indiana Dentists does indicate that market inquiry may be foregone in the face of "proof of actual detrimental effects," 476 U.S. at 460-61, 106 S.Ct. at 2019, there has been no such proof here, as confirmed by the unrebutted expert testimony.

Courts have applied truncated, or "quick look," versions of the Rule of Reason only rarely and with great circumspection. So far, such cases have arisen only in the context of horizontal conspiracies among competitors, which, but for a special circumstance would have been per se illegal. See, e.g., FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) (horizontal agreement among members of dental profession to withhold a particular service); NCAA v. Board of Regents, 468 U.S. 85 (1984) (horizontal agreement among educational institutions to restrict quantity of televised college football games); National Association of Professional Engineers v. U.S., 435 U.S. 679 (1978)

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21 It goes without saying that the antitrust laws are designed to protect competition, not competitors. Military Serv. Realty, supra, 823 F.2d at 832, citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). VVL's attempt to impose antitrust liability with no analysis of market or competitive effect amounts to an effort either to turn allegedly unfair business practices into a per se violation of the antitrust laws (rejected by this Court in Military Serv. Realty, supra, 823 F.2d at 831), or to convert an activity allegedly impacting a particular competitor's operations into a presumed anti-competitive effect. But that is inconsistent with the precept that even elimination of a particular competitor does not prove anti-competitive, effect. Id. at 832.

(horizontal agreement among engineers to refuse to engage in competitive bidding) [22]

The agreement between Grace and HGSI with respect to the property in and adjacent to the Landmark is not a horizontal agreement. HGSI does not participate in any part of the lightweight aggregates industry. HGSI instead is a consumer of land in and adjacent to the National Historic Landmark. Any restraint in the agreement between Grace and HGSI is a vertical restraint. Application of the naked restraint doctrine has routinely been rejected in cases involving a vertical non-price restraint. E.g., U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 594-95 (1st Cir. 1993) (abbreviated Rule of Reason only used for horizontal agreements); Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 953 F.Supp. 617, 654-55 & n.8 (E.D. Pa. 1997); Parikh v. Franklin Med. Ctr., 940 F.Supp. 395, 401 (D. Mass. 1996).

The District Court could have rejected VVL's "naked restraint" argument on this basis. However, the District Court adopted an alternative approach, more favorable to VVL, giving VVL the opportunity to attempt to establish on the economic merits that the restraint warranted truncated Rule of Reason analysis. 108 F.Supp.2d at 572-74 (J.A. 602-04). The District Court looked to California Dental Ass'n v. FTC, 526 U.S. 756, 119 S.Ct. 1604 (1999), where the' Supreme Court granted certiorari to resolve conflicts between the circuits on when to employ abbreviated rule-of-reason analysis. J.A. 602, 108 F.Supp.2d at 572, citing 526 U.S. at 764-65.

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[22] Lower court cases appiying the naked restraint doctrine similarly are limited to horizontal agreements. Law v. NCAA, 134 F.3d 1010 (10th Cir.) (agreement by competitors to set salaries), cert. denied, 119 S.Ct. 65 (1998); United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993) (horizontal agreement among competing colleges to determine the amount of financial assistance to award to students admitted in common); Chicago Prof. Sports Ltd. v. NBA, 961 F.2d 667 (7thCir.) (horizontal agreement among owners of basketball teams to limit the number of televised games), cert. denied, 506 U.S. 954 (1992).

California Dental involved a horizontal agreement between dentists that restricted the kind of advertising in which they might engage. The Supreme Court held that the Ninth Circuit committed reversible error in taking too quick a look at the alleged restraint. The District Court simply followed the approach set forth in California Dental in the proceeding below.

In California Dental, the Court indicated that a court may not apply the abbreviated Rule of Reason test simply on the basis of theoretical arguments that an effect is anticompetitive. The Supreme Court held that, so long as it might "plausibly be thought" that a restraint might possibly have "no effect at all on competition" (119 S.Ct. at 1613), "theoretical" assumptions about a restraint's anti-competitive effects do not justify application of an abbreviated Rule of Reason. Instead, a lower court must determine if the effects "actually are anticompetitive." 119 S.Ct. at 1615 n.12. Accord, Brookins v. IMCA, 219 F.3d 849, 853-54 (8th Cir. 2000).

It is easy to see how it may "plausibly be thought" that a transfer of land for conservation would have no effect on competition. If there were apparent substitutes for based on four days of expert testimony in a Daubert hearing.

Persuaded that the defendant's economic evidence had rebutted VVL's allegation of patent anticompetitive effect, the District Court concluded that, as in California Dental,

> "the point is not that the restrictions necessarily have an anticompetitive effect, a procompetitive effect, or no effect at all. The point is, the restrictions do not have an anticompetitive effect so manifest as' to merit only a 'quick look.'"

108 F.Supp.2d at 575 (J.A. 604). In short, the criterion established in California Dental for application of the abbreviated Rule of Reason analysis to "naked restraints" was not met by VVL.

Indeed, it would have been reversible error for the District Court to have applied the "quick look" doctrine to a restraint alleged with respect to vermiculite mining rights when the only competent expert economics testimony in the case was that no such market existed and no anticompetitive effects had been established as a matter of economic science.

In short, VVL's insurmountable problem is that the District Court examined the economic merits of VVL's case. The Court found the evidence insufficient under the law to sustain a truncated application of the Rule of Reason, and further found that VVL neither had sustained its burden under the full Rule of Reason, nor could sustain it, in the absence of any expert to rebut the defense experts.[23]

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[23] In its Brief, VVL several times asserts that HGSI's expert, Professor Mills, did not do an investigation sufficient to determine 'the relevant market (VVL Brief at 56 & 63), and that Mills' statements were "unsupported assertions." The burden was on VVL, not defendants, to establish the antitrust relevant market. As explained by Professor Goetz, defense economists at summary judgment do not have to perform all the analysis required to establish plaintiff's case. J.A. 273-74. All Grace or HGSI needed to show was that VVL had failed in its burden. Professor Mills accordingly reviewed VVL's evidence and methodology (which is the evidence on which their excluded witness Schwartz purported to rely in his expert testimony), and provided his expert opinion that the evidence in question was insufficient to define a market, or to show market power, and instead indicated that the market was broader than the one espoused by VVL, as a matter of economic science. Contrary to VVL's bombast, Professor Mills was hardly "unsupported." Professor Mills reviewed numerous discovery responses, testimony, and outside reports. E.g., J.A. 418. Additionally, Mr. Ellicott supplied extensive analysis which reputable economists (see, e.g., J.A. 436 n.24 (Goetz) would regard as indicative of a broader market. Grace's expert (Godek) also supplied evidence disavowing a vermiculite mining rights market (J.A.466-67 & 1045). Dr. Godek supported a market much broader than

VVL advances two additional arguments to attempt to circumvent the economic realities found by the District Court. First, and remarkably, VVL argues that this Court had already determined that the restraint VVL alleged is manifestly anticompetitive, thus obviating VVL's need to make any showing that the restraint in fact was anticompetitive. VVL Brief at 46, citing 156 F.3d at 541. At page 541 (J.A. 146), this Court alludes approvingly to the following statement of the District Court (965 F.Supp at 815 (J.A. 95) (emphasis added))

> "This is not to say that HGSI's efforts to suppress the supply of vermiculite (or vermiculite mining rights) cannot detrimentally affect competition. Ignoring for the moment potential substitutes for vermiculite (as well as other relevant characteristics of the market), it can readily be assumed, at this stage of analysis, that constriction of a finite supply of vermiculite may drive up the price of that resource."

This Court clearly was indicating only that VVL's allegation was sufficient to defeat a F.R.C.P. 12(b)(6) dismissal on the bare record of the pleadings. It would be extraordinary, and contrary to ordinary principles of review, for a Court of Appeals to have intended to make a case-dispositive factual finding on the basis of allegations in a plaintiff's untested Complaint alone.

At summary judgment, the District Court found no evidence of a price increase for vermiculite ore or other market power. The District Court had the benefit of a

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vermiculite (id.). Professor Mills was prepared to testify that the market was broader than vermiculite at trial. J.A. 848 (offer of proof). Finally, HGSI's review economics expert, Professor Goetz (co-author of a casebook on antitrust law), corroborated the conclusions of Professor Mills. E.g., J.A. 425-41.

record which had explored the assumptions of the pleadings, as defended by VVL's (eventually excluded) expert. This record both established the invalidity, as a matter of economic science, of VVL's assumptions, and also articulated the plausible, persuasive counter-testimony of defendants' experts. VVL's argument that the restraint should nonetheless have mandatorily been treated as nakedly anticompetitive would have this Court require trial courts to accept economic nonsense.

VVL also claims that the result reached by the District Court is inconsistent with M&N Medical Supplies, supra. VVL Brief at 67. VVL, after citing alleged evidence that Grace in fact sustained a 5% price increase for a particular grade of vermiculite concentrate sold to certain intermediate users, claimed in essence that this was more evidence than was before the Court in M&M Medical for a market.

As the District Court indicated (J.A. 609), VVL fundamentally misreads M&M. In M&M, the lower court ignored an expert economist's affidavit which relied on such evidence in support of an expert opinion that monopoly power was exhibited in an antitrust relevant market. In contrast, plaintiff VVL has no expert affidavit in support of its construction of the evidence, because it has no economics expert at all. VVL cannot argue that a lawyer's partisan arguments should now be treated as equivalent to testimony by an expert economist, who was subject to cross examination.

Additionally, the price increase to which VVL points has to do with a particular subgrade of vermiculite concentrate, and nothing to do with vermiculite ore. It thus does not show an ore market, much less one confined to Louisa County, which is what VVL supposedly seeks to prove exists for its Sherman § 1 claim. Moreover, all the expert economics testimony explained that the price

movement in question was consistent with changing demand and supply curves, and thus not indicative of market power.

> "An observed price increase can ... be caused by a rightward shift of the demand curve, a leftward shift of the supply curve, or some combination of movement by both curves. Without more, it is simply a non sequitur to attribute an observed price increase to a single vendor's conduct rather than, for instance, an independent demand shift or supply shift, neither of which implicate market power." J.A. 438-29 (Goetz).

Professor Goetz goes on to note undisputed evidence that "both the supply and demand curves were indeed in substantial flux." Accord, J.A. 467-70 & 428-29 (Godek); 407 (Mills).

Purportedly on the basis of M&M, VVL urges a rule in which a price increase somewhere, standing alone and in the absence of any expert support and in the face of an expert rebuttal, would be sufficient evidence of anticompetitive market power to get a case to a jury. VVL Brief at 67. As the District Court recognized (J.A. 613), this is yet another effort by VVL to enshrine a piece of economic nonsense as the law of this Circuit. A price differential between two current producers can represent differences in quality, service, or cost. A shift in price over time may represent a change in the demand curve or supply curve (i.e., changes in the demand and supply for a product), not movement along a curve (i.e., exhibition of market power). E.g., J.A. 428-29. This is the so-called "identification problem," much discussed in the Daubert affidavits and hearing, and not understood by Schwartz, or evidently VVL. Standing alone, a price differential, or a price increase, indicates neither a market, nor market power, as a matter of

economic science. If mere price differentials alone were sufficient to ensure a jury trial, a moment's reflection would indicate how defendants with absolutely no market power -- such as competing gas stations and grocery stores -- would face inevitable antitrust trials in this Circuit.

In M&M, the price differential was only one significant element in a pattern of facts examined and opined upon by a competent expert. The defendants in M&M apparently did not challenge the validity of the expert's approach; here, defendants did insofar as it relied On a price differential, consonant with this Court's suggestion in M&M to the lower court, and consonant with Daubert.

As it did at summary judgment, VVL wishes to debate whether the donation was pro-competitive, and invests considerable effort in arguing for a per se rule that all transfers for non-consumptive purposes are anticompetitive. But as the Supreme Court held in California Dental, and as the District Court held below, before one gets to any need by the defendants to show that an alleged restraint is pro-competitive, the plaintiff must-at the very least establish that the restraint actually is anticompetitive, which VVL, failed to do.

Nonetheless, defendants did meet their minimum requirements under the "pro-competitive prong" of the inapplicable truncated Rule of Reason standard. HGSI's expert economics witness, Professor Mills, articulated the market role of environmental entities that organize and register the individual market preferences of its members for the legitimate economic good of environmental quality. J.A. 408-09 & 212-15. Accord, J.A. 437 (Goetz ¶ 26); 1045 (Godek). In this sense, HGSI was merely a market participant competing with VVL for the Louisa mineral deposit: HGSI wished to consume the vermiculite for historic preservation purposes; VVL wished to consume the

vermiculite for mining purposes. In either event, the vermiculite was an input. In this light, HGSI is a vehicle to implement its members' economic preferences for, resource allocation. This activity is a legitimate part of the 'competitive process that the market uses, to determine alternative uses of resources, vermiculite included. It is thus pro-competitive.

VVL argues that use of land for historic preservation, or presumably a country club (like Shenandoah Crossing immediately to the north) or wildlife habitat is simply "good motives" or "good intent" and that good intent must be disregarded. VVL Brief at 39-40, citing Professional Engineers, supra, 435 U.S. at 691-92. But Professional Engineers said that "[t]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." HGSI through unrebutted expert economics evidence, made a showing that non-consumptive use of the land is an alternative land use which has every right to compete in the market, especially when the land in question is inside a National Historic Landmark.

This case has now gone through an extensive trial on VVL's Sherman § 2 conspiracy to monopolize claim. The District Court as trier of fact determined that VVL had failed to establish any conspiracy to monopolize. The District Court found that neither Grace nor HGSI expected the donation to result in monopoly power in any market or segment of commerce. 144 F.Supp. at 593-95 (J.A. 966-67, ¶¶ 35-50). The District Court also found that VVL had not. proven any current or future damaging effect on competition . J.A. 968-71. Failure to prove anticompetitive effect or intent would of course be fatal to VVL's Sherman § 1 claims had they gone to trial.

VVL does not challenge the District Court's determination on conspiracy to monopolize. It would be anomalous to find the donation to be manifestly anticompetitive under Sherman § 1 when VVL could not prevail at a trial on similar issues under Sherman § 2. The results of the full trial demonstrate the rationality of the District Court's summary judgment opinion. VVL seeks by formalistic arguments that fly in the face of persuasive economic evidence to extract treble damages without showing any market, market power, or anticompetitive effects.

B. The Trial Court Properly Found No Causation

VVL challenges the trial court's findings, after trial, of no cause in fact for both Sherman Act and Virginia Civil Conspiracy Act purposes. Under the applicable review standard for trial findings ("clearly erroneous" per F.R.C.P. 52(a), not de novo as VVL asserts (VVL Br. at 15)), VVL' s thrusts miss the target.

The standard test for cause in fact is the "but for" test:

> "Under the but-for test, the defendant's conduct is a cause in fact of the plaintiff's harm if, but-for the defendant's conduct, that harm would not have occurred."

D. Dobbs, The Law of Torts 409 (West 2000). Similarly, "[i]f the plaintiff would have suffered the same harm had the defendant not acted [wrongfully], the defendant's conduct is not a cause in fact of the harm." Id. Virginia follows the but for test for causation. In Jordan v. 'Jordan, 220 Va. 160, 257 S.E.2d 761 (1978), defendant backed her car over plaintiff without looking into the rear-view mirror. The Virginia Supreme Court found no cause in fact, because plaintiff was squatting such that she would not have seen him in any event. See also Ring v. Poelman,

240 Va. 323, 397 S.E.2d 824 (1990); wells v. Whitaker, 207 Va. 616, 151 S.E.2d 422 (1966); Etheridge v. Norfolk So. R., 143 Va. 789, 129 S.E. 680 (1925). Causation of the injury alleged is a requirement for civil conspiracy liability in Virginia. See 144 F.Supp.2d at 609-10 (J.A. 978, ¶137), quoting Gallop v. Sharp, 179 Va. 335, 19 S.E.2d 84, 86 (1942). See also Allen Realty Corp. v. Hobarton, 227 Va. 441, 318 S.E.2d 592 (1984).

The trial court found that Grace would have retained the property but for the donation to HGSI, or would have sold it to a third party reserving the mineral rights. Moreover, the trial court found that Grace had attempted to sell the property to VVL in 1991, but the negotiation broke off due to VVL's intransigence. The donation was thus not the cause in fact for any harm to VVL. For these reasons, the District Court found that VVL had failed to show that the alleged Sherman § 2 conspiracy had caused VVL any injury in fact (144 F.Supp.2d at 598-99 (J.A. 969-70, ¶¶ 66-82)), and that VVL failed to demonstrate causation required under Virginia law to make out a claim under the Virginia Civil Conspiracy Act. 144 F.Supp.2d at 609-610 (J.A. 977-78, ¶¶ 136-38). The trial court findings on causation may not be upset unless clearly erroneous. F. R. Civ. P 52(a).

VVL does not attempt to refute the findings. It instead makes three misplaced legal arguments. VVL's chief argument with respect to causation is that the District Court misapplied Lee-Moore Oil Co. v. Union Oil Co., 599 F.2d 1299 (4th Cir. 1979). Lee-Moore Oil was a federal antitrust case. In that case, the plaintiff alleged a horizontal conspiracy among major oil companies, among other things, to drive from the market "jobbers," basically middlemen who bought gasoline and other petroleum products from the major oil companies and resold them to retail gas stations. The plaintiff asserted damages in the form of losses due to the alleged conspiratorial

termination. Under Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959), such a conspiracy, if proved, would be a per se violation of the Sherman Act. A supplier may lawfully refuse to deal with a customer so long as the refusal was not pursuant to a horizontal conspiracy. But under Klor's, damages are recoverable from a refusal to deal pursuant to a horizontal conspiracy even if they would not be recoverable had the refusal to deal been lawful. See 599 F.2d at 1302 n.5. The Lee-Moore court accordingly held that "Lee-Moore's evidence shows injury which, if proved to have been caused by an antitrust violation, would be recoverable under [§4 of the Clayton Act, 15 U.S.C. §15]." 599 F.2d at 1300 (emphasis added).

Lee-Moore has no application to causation for purposes of a Virginia Civil Conspiracy Act claim. In addition, its antitrust relevance is limited to situations where plaintiff VVL can prove a horizontal conspiracy similar to that in Klor's. Here VVL has proved no antitrust violation at all.

Lee-Moore cites for its authority only Klor's and similar horizontal antitrust conspiracies amounting to per se violations. VVL has never asserted that Grace's donation to HGSI constitutes some kind of horizontal conspiracy, nor could it: HGSI is not a vermiculite producer. Nor has VVL claimed that the donation amounted to some other form of per se violation of the antitrust laws.

Under these circumstances, ordinary rules of causation apply. To recover, a Sherman Act plaintiff must show, as in any tort action, that the conduct of which complaint is made actually caused plaintiff harm. Windham v. American Brands, Inc., 565 F.2d 59, 66 (4th Cir. 1977) ("crux of [an antitrust] action is injury"), cert. denied, 435 U.S. 968 (1978). If the alleged conspiracy was irrelevant to the "damage" alleged (i.e., if but for the

alleged conspiracy, the same "damage" would have occurred), there are no compensable damages. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89 S.Ct. 1562 (1969) (plaintiff must show "some damage flowing from the unlawful conspiracy," emphasis in original)

VVL next claims that this Court extended Lee-Moore in its earlier decision in Virginia Vermiculite, Ltd. v. W.R. Grace, 156 F.3d at 540 (1998), and the District Court's holding after trial that no causation was shown violated law of the case. But this Court in its 1998 decision held only that a showing by defendants that Grace might have held on to the property, or could have done so, was insufficient to prevail on a motion to dismiss. This Court posed the relevant question for further proceedings as follows: "whether Grace would have allowed mining in the absence of both the donation and the nonmining agreements." 156 F.3d at 539 (J.A. 138-39) (emphasis added). In other words, the question is whether but for the donation and nonmining agreements, Grace would have allowed mining.

The trial court well understood this, emphasizing that the Court of Appeals indicated only that the fact that Grace "could have achieved the same result through lawful means" was not a defense. 144 F.Supp. 2d at 599 (J.A. 970, ¶72) (emphasis in original), quoting 156 F.3d at 539. But the court expressly concluded that, "consider[ing] all the evidence and testimony presented at trial ... VVL failed to prove by a preponderance of the evidence that Grace would have sold or leased its properties to VVL, or that Grace otherwise would have allowed VVL to mine those properties in the absence of both the donations and covenants not to mine." 144 F.Supp.2d at 599 (¶73, emphasis in original). Indeed, Grace had legitimate interests which were not consistent with a sale to VVL. 144

F.Supp.2d at 599 (J.A. 970, ¶ 75).[24] The trial court went on expressly to find (144 F.Supp.2d at 599, ¶ 76) that

> "but for the donations, Grace likely would have pursued one of its other options, such as selling the properties for a non-mining use (thus maintaining the mineral rights) to a third party or to the government, or retaining the properties without mining them, as it had for twenty years."

Furthermore, [i]t ... was not proven that Grace would have sold to VVL under any circumstances, let alone 'but for' the concerted action." 144 F.Supp.2d at 599 (J.A. 970, ¶77). These findings are supported by substantial evidence, and are hardly "clearly erroneous." F.R.C.P. 52(a).

In addition, the trial court, after lengthy findings on the failed 1991 negotiations between Grace and VVL, found that VVL's own intransigence (i.e., VVL's strategic decision to terminate its 1991 negotiations with Grace to purchase the very property at issue), was the reason VVL did not acquire the properties. 144 F.Supp.2d at 571 (J.A. 949, ¶ 134). The trial court specifically found that Grace perceived Dr. Sansom's offer as being inadequate, and as indicating VVL's inability or unwillingness to deal with Grace (id. ¶¶ 132-

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[24] The trial court had determined at summary judgment that VVL had failed to produce sufficient evidence that Grace had any duty to deal with VVL under the antitrust laws. See 144 F.Supp. at 598 (1168), citing 108 F.Supp.2d at 600-01. VVL does not appeal from these findings (all under Sherman § 2), and is bound. Grace was under no general duty to help a competitor. Olympia Equipment v. Western Union, 797 F.2d 370, 375 (7th Cir. 1986).

33).[25] VVL's own intransigence is a classic intervening and superceding cause, cutting off recovery.[26]

For similar reasons, VVL failed to show that the restrictive covenants barring off-road transport caused harm to VVL. Although the trial court construed the restrictive covenants to bar off-road haul, the court properly viewed that construction as irrelevant, because the court further found that VVL failed to show that either Grace or HGSI would otherwise have allowed such haulage. In short, "VVL would have incurred its transportation costs even if the concerted action had never occurred." 144 F.Supp.2d at 599 (J.A. 970, ¶¶79~80) [27]

VVL's final argument is that it would have been unlawful for Grace to have continued as owner of the former Peers properties, or to have sold the properties and retained the mineral rights, as the District Court found Grace would have done. VVL Brief at 26. In addition, VVL argues that Grace could not have sold the property for non-mining purposes to any third party, because this "would

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25 Indeed, VVL's own plant manager admitted that VVL in retrospect should have offered more money to Grace for the property. Tr. Tr. 361:4 et seq.; see also Gumble 12/12/97 Dep. at 405:19.

26 Federal Insurance Co. v Sabine Towing & Transportation Co., 783 F.2d 347, 350 (2d Cir. 1986); Ellerman Lines, Ltd. v. The Steamship President Harding, 288 F.2d 288, 289. (2d Cir. 1961) (Friendly, J); W.B. Moses & Sons v. Lockwood, 295 F. 936, 941 (D.C.Cir. 1924); American Can Co. v. Russellville Canning Co., 191 F.2d 38, 55 (8th Cir. 1951); Hanover Shoe, nc. v. United Shoe Machinery Corp., 185 F.Supp. 826, 829 (M.D. Pa.),aff'd, 281 F.2d 481 (3d Cir.) , cert. denied, 346 U.S. 901 (1960).

27 The trial court did not reach an alternative ground, supported by substantial evidence, that VVL, although informed that neither Grace nor HGSI would construe the covenant to bar the transport sought, failed to pursue a proposal to acquire rights for off-road transport,, merely raising the issue with HGSI in late 1992, and then not choosing a transport method. See p. 9 supra. See Out Front Productions v. Magid, 748 F.2d 166, 170 (3d Cir. 1988) ("law will not countenance a dormant plaintiff who springs into action only when it is time to file suit.")

have constituted precisely the same sort of illegal conspiracy as the transfer Grace actually made to HGSI, subjecting Grace to the risk of treble damages under both antitrust law and the Virginia Conspiracy Act." Id.

VVL's position is baseless. Grace acquired a full fee interest in the A.D. and M.F. Peers properties, for which it paid substantial consideration (approximately $200,000 each in 1972 dollars). See, e.g., J.A. 1408. In each case, Grace's contracts with the Peers gave Grace complete discretion to mine or not to mine,[28] and nothing in the Peers conveyances or agreements appended thereto barred alienation by Grace. (Indeed, the unrecorded A.D. Peers agreement very explicitly provided for such alienation.) Grace clearly could have kept the properties without mining, or could have sold them reserving the right to mine, which is what the trial court found Grace would have done. This result is fully consistent with the result reached in the Brandy litigation, where the circuit court ruled that the Grace's assignment of the Brandy mining lease caused no damage because Grace was under no obligation to mine and might never have mined under an "at-will" contract. 32 Va.

In any event, any obligation of 'good faith to the Peers, who had sold their properties in fee to Grace, was discharged when Grace offered the property to VVL on non-exclusionary terms, but VVL shunned a deal at a price Grace viewed as adequate. If VVL sustained any injury, the injury was self-inflicted, flowing from VVL's own intransigent

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[28] The M.F. Peers deed (PTX 47), correction deed (PTX 48) and subsequent agreement (PTX 51) all incorporated language to the effect that Grace "shall have no obligation to mine the property" and "mining of the property shall be at the sole option of [Grace]." The A.D. •Peers deed set forth no duty to mine or to pay royalties. PTX 49. An unrecorded agreement did provide that "[t]he decision as to whether to commence the mining of vermiculite or other minerals on the premises shall be within the sole discretion of [Gracel and [Grace] shall have no legal obligation to do so." Pl. Tr. Ex. 50, ¶5(A).

negotiating position. VVL has no basis for vicariously asserting some duty on the part of Grace to the Peers to subsidize VVL, as a backdoor way for VVL to obtain damages for what VVL did to itself. Virginia courts have been rightfully skeptical of allowing civil conspiracy recoveries for disgruntled potential buyers when a seller transfers property to an alternative grantee as opposed to another. E.g., Meadow Limited Partnership v. Heritage Savings and Loan, 639 F.Supp. 643, 653 (E.D.Va. 1986) (fact that negotiations failed does not mean civil conspiracy when seller sells to another).

C. VVL Failed to Show Antitrust Injury

VVL must show it sustained antitrust injury - - the kind of injury the antitrust laws were intended to prevent - - to make out a Sherman Act violation. See Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977). The trial court properly found that the injury ITVL claimed did not amount to injury to competition (antitrust injury). 144 F.Supp.2d at 597-600 (J.A. 968-71, 9 59-82). Antitrust injury is the kind of injury that derives from an anticompetitive effect. As determined at summary judgment, VVL made no showing of market or anticompetitive effect, nor could it in the absence of experts and in the face of defense experts. Additionally, the District Court's factual findings that VVL had ample reserves both in Virginia and in South Carolina to continue in operation, that VVL operates profitably in South Carolina notwithstanding transportation distances twenty times as great as those in Virginia, that VVL's net income has increased, that it has not lost market share (144 F.Supp.2d at 597-98 (J.A. 968, ¶64)); that transportation costs are part of mining, and that the uncommitted Nininger reserves are available (144 F.Supp.2d at 599-600 (J.A. 970-71, ¶¶80 & 86-87)) are not "clearly erroneous" (F. R. Civ. P. 52(e)), and support the conclusion of no antitrust injury.

D. VVL Fails to Show Standing for Purposes of the VCCA Claim

In order to establish liability under the VCCA, the plaintiff (here, VVL) has to establish an underlying "actionable wrong." Citizens for Fauquier County v. SPR Corp., 37 Va. Cir. 44 (Fauquier County Cir. Ct. 1995). In the Citizens for Fauquier County case, the plaintiffs alleged a civil conspiracy based on the "unlawful" filing of a lawsuit under Virginia Code § 8.01-271.1 (a statute analogous to F. R. Civ. p. 11). The Circuit Court explained that "[w]here there is no actionable claim for the underlying alleged wrong, there can be no action for civil conspiracy based on that wrong.", 37 Va. Cir. at 50. Because § 8.01-271.1 claims are not independently actionable the Circuit Court held they cannot be the basis of a civil conspiracy action. See also Doe v. Bruton Parish Church, 42 Va. Cir. 467, 483 (1997) (underlying actionable wrong of fraud not established).

It is axiomatic that the "unlawful act" relied upon for civil conspiracy liability must be not only the "basis of the action" but also "the activity which results in damage to the plaintiff." Gallop v. Sharp, 179 Va. 335 (1942); see also Allen Realty Corp. v. Holbert, 227 Va. 441, 318 S.E.2d 592 (1984), Orr v. Beamon, 77 F.Supp.2d 1208, 1214-15 (D. Ks. 1999) (no recovery for civil conspiracy if plaintiff lacks standing to assert the underlying wrong).

The essential elements for an "actionable wrong" are very clear in Virginia. In the recent words of the Virginia Supreme Court (Austin v. Consolidation Coal Co., 256 Va. 78, 82-83, 501 S.E.2d 161, 163 (1998)), these elements are

> "(1) a legal obligation of a defendant to the plaintiff, (2) a violation or breach of that duty or right, and (3) harm or damage to the plaintiff as a proximate consequence of the violation or breach. ... A cause of action does not evolve unless all of these factors are

present." Stone v. Ethan Allen, Inc., 232 Va. 365, 368-69 (1986) (quoting Locke v. Johns-Manville Corp., 232 Va. 951, 957, 275 S.E.2d 900, 904 (1981)); accord Van Deusen v. Snead, 247 Va. 324, 339, 441 S.E.2d 207, 210 (1994); Atlantic Co. v. Morrisette, 198 Va. 332, 333, 94 S.E.2d 220, 221-22 (1956)."

The only potentially actionable "wrong" which the District Court found was Grace's alleged breach of a duty of good faith owed to A.D. Peers and M.F. Peers when Grace donated the former A.D. Peers property to HGSI in 1994 and the M.F. Peers property in 1992. See 144 F.Supp.2d at 609 (J.A. 977, ¶134). But even assuming arguendo that Grace's donation breached a duty (HGSI appeals this in HGSI's cross appeal, infra), that does not serve as a basis for VVL's maintenance of a civil conspiracy action here. The duty that Grace allegedly breached was a duty owed solely and exclusively to A.D. Peers and M.F. Peers. No duty was owed to VVL. VVL was not a third party beneficiary of the Grace/Peers relationships: Whatever may be said about the Peers/Grace agreements, they were not for the benefit of Grace's competitors. Since Grace owed no duty to VVL, and since VVL is not a third party beneficiary of the Grace/Peers arrangement, VVL can maintain no cause of action against either Grace or HGSI based on the alleged breach of duty owed the Peers.[29] This is especially the case since the trial court found that VVL through its own intransigence failed to acquire the former Peers properties from Grace in 1991 in the first place.

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[29] VVL admitted in its Proposed Findings that it was not a proper plaintiff to assert a claim of tortious interference against HGSI. VVL Proposed Findings p. 67 n.4. If VVL lacks standing to raise such a claim, it lacks any basis to maintain a civil conspiracy action here.

A.D. Peers and M.F. Peers settled all of their claims against Grace, and all were dismissed with prejudice, by order dated September 11, 2000. Neither A.D. Peers nor M.F. Peers sued HGSI. Thus, while the District Court suggested that the alleged breach of good faith by Grace "still can serve as a predicate for a finding of unlawful means under the Virginia Conspiracy Act" against HGSI, 144 F.Supp.2d at 606 (J.A. 975, ¶122), citing Multi-Channel TV Cable Co. v. Charlottesville Quality Cable, 108 F.3d 522, 527 (4th Cir. 1997), this does not mean that VVL has made out a cause of action such that it can maintain this suit. Under Austin v. Consolidation Coal Co., supra, the party bringing an action against HGSI for recovery on some actionable wrong must still allege a breach of some duty to it.[30]

VVL asserts that the District Court found that a tort had been committed. VVL Brief at 28, citing 144 F.Supp.2d 609 (J.A. 977). But the District Court made no finding of a recoverable tort, or any other "actionable wrong," which VVL has standing to assert.[31]

The only underlying actionable wrong to VVL that VVL has ever alleged against HGSI is conspiracy in violation of Sections 1 and 2 of the Sherman Act. VVL has failed to establish a Sherman § 1 conspiracy for reasons totally apart from its causation arguments, and it does not appeal the judgment against it under Sherman § 2. In short, VVL is the wrong plaintiff to maintain a civil conspiracy action against HGSI for a breach of a duty Grace owed to the Peers.

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[30] In the Multi-Channel litigation, the plaintiff MultiChannel (a/k/a Adeiphia) had suffered independent actionable wrongs in the form of wrongful conversion, tortious interference with contractual relations, and other claims. 108 F.3d at 525. Thus, nothing in Multi-Channel is contrary to the argument presented herein.

[31] To the extent the trial court found a wrong VVL has standing to assert, HGSI takes issue in our cross appeal, infra.

The District Court granted summary judgment against VVL's claim for $3,191,823 (VVL Br. at 75) future lost profits on the ground that VVL had failed to show "the extent of such damage as a matter of 'just and reasonable inference,'" 108 F.Supp.2d at 597 (J.A. 622), and that the amount of such damages "would be ascertainable only by speculation." Because it acknowledged that it had ample reserves in Virginia sufficient to last until 2013, VVL did not even claim lost profits until that year -- some 20 years after the announcement of the donation to HGSI and over a decade from the time of the trial.[32]

VVL makes a vague argument that fact of damages in the form of lost profits should be presumed because the donation forecloses a supply (VVL Brief at 72), but this amounts to assuming that vermiculite ore in Louisa County is sufficiently important to impact an antitrust relevant market. VVL produced no evidence of such a market; defendants produced expert evidence indicating that no such market existed; and the District Court found, in the Nininger deposit, as well as resources in South Carolina, answers for VVL reserve needs. In short, VVL failed to show any essential predicate for its damage theory before this Court.

Moreover, VVL's assumptions of market stability, including stable production and profit, were unsupported and contrary to the record. Imports were increasing. Domestic production and domestic demand for vermiculite in recent years had been variable. 168 F.Supp.2d at 597 (J.A. 622). Additionally, VVL argued that Grace's Libby vermiculite mine had closed due to asbestos contamination (see note 7), but similar contamination has now again been identified as present in VVL's Louisa County deposits. J.A.

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32 None of the parties has found a case awarding future profits which begin to accrue a generation after the conduct of which complaint is made

868-933. Major substitution in favor of alternatives for vermiculite occurred at Grace and The Scotts Company; and a new entrant; had appeared to work a Montana deposit See, e.g., J.A. 1123-24 (Ellicott). HGSI's lightweight aggregates expert Graham Ellicott concluded that "it is difficult to look forward more than ... five years with any confidence in the prediction of fortunes of the crude vermiculite producers." J.A. 1137. Accord, J.A. 1048-49 (Godek: substitutes, increasing imports, availability of reserves in Virginia and elsewhere all render future damages speculative)

In short, VVL's alleged lost future profit claim is speculative in both fact and amount. An antitrust plaintiff may not recover in such circumstances. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 329 (1971). Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981)), on which VVL cites for its "traditional rule" that plaintiffs seeking antitrust damages need do next to nothing, does not support VVL at all. In J. Truett Payne, the Supreme Court observed that under the terms of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), a plaintiff need only show that a. price discrimination "may" lessen competition, but to recover damages under § 4 of the Clayton Act, 15 U.S.C. § 15, must show an injury to itself. The Supreme Court indicated that any leniency in the showing as to damages depended upon showing that the defendant was liable in the first place as a wrongdoer under the antitrust laws, which had not been shown. 451 U.S. at 568. Four Justices, in a separate concurrence, indicated that leniency in calculating the amount did not amount to leniency in showing the actual fact of damage. 451 U.S. at 569. In other words, the plaintiff needed to show liability and fact of injury, before any "traditional rule" relating to leniency in calculating the amount would kick in. Here, VVL has not shown that HGSI is a wrongdoer under the Sherman Act, or that it has injury in fact.

VVL also conflates the Virginia Conspiracy Act and the Sherman Act. VVL argues for the "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury" (VVL Brief at 73), but then seeks to spin this into Virginia Conspiracy Act damages (VVL Brief at 71). The Conspiracy Act requires that all its elements, including damages and causation, be proved by "clear and convincing" evidence.

F. VVL Fails to Establish a Basis for Iniunctive Relief

VVL asks this Court to find that the trial court erred in failing to order injunctive relief in the form of an order directing HGSI to transfer its property to VVL. VVL Brief at 75. VVL predicates its request for injunctive relief on a presumed violation of the antitrust laws, suggesting that an injunction would "free" the properties and, also, entitle it to an attorneys' fee award. VVL Brief at 77.

First, VVL fails to show any antitrust injury that an injunction would redress. As the trial court explained (144 F. Supp. 2d at 600 (J.A. 971, ¶ 86)), Cargill v. Monfort of Colorado, 479 U.S. 104, 112 (1986) indicates VVL can only obtain injunctive relief against a threatened injury if it could obtain compensation should that injury actually have occurred. The trial court found that VVL had failed to make out any such injury. The trial court found that Grace and HGSI did nothing to preclude VVL from continuing to operate in South Carolina, and that "even if VVL ultimately depletes its current reserves, it could stay in business for decades if it acquired some or all in the Nininger property." 144 F. Supp. 2d at 600 (¶86). VVL made no showing that driving it out of business in Virginia would impact competition, now or in the future. Such proof verges on the impossible since VVL has no experts to analyze the market, and faces defense experts testifying to the contrary. As a corollary, where, as here, there is no showing of any anti-competitive effects, VVL, as a private litigant, does not have

standing (i.e., it can prove no threatened loss or damage to its own interests) to seek it. See California v. American Stores, 495 U.S. 271, 296, 110 S.Ct. 1853, 1867 (1990).

Second, traditional equitable principles govern equitable relief. The trial court found that VVL's own intransigence in the 1991 Grace/VVL negotiations resulted in VVL's failure to acquire the Grace properties. VVL should certainly not be permitted to benefit from such conduct. In addition, "the public interest" is a concern in evaluating the propriety of equitable relief, especially for a private litigant. California v. American Stores, supra, 495 U.S. at 295, 110 S.Ct. at 1867. Congress has declared that the public interest favors historic preservation (16 U.S.C. § 470(b)), and Congress has ratified the historic district and landmark listings which include Green Springs. 16 U.S.C. § 470a(a) (1) (B). The Advisory Council on Historic Preservation has found that expansion of vermiculite mining in the National Historic Landmark threatens the integrity of the Landmark. J.A. 1187-88 (DTX 33). Accordingly, expansion of vermiculite mining in the Landmark is contrary to the public interest.

Third, the District Court found no antitrust duty on the part of Grace to sell to or otherwise to aid VVL, and there is no general duty to help a competitor. See note 24. Under the circumstances, an injunction to require HGSI to make its property available for mining would amount not only to a taking without just compensation, but also to a taking for private purposes, in either event running afoul of the Fifth Amendment.

Finally, VVL after the close of discovery belatedly sought to amend its Complaint among other things to add, for the first time, a request for injunctive "ordering HGSI to allow mining of the property conveyed by Grace to HGSI."

[33]HGSI opposed such an amendment on the ground, among other things, that HGSI had not had an opportunity to take discovery on issues which such relief would invoke. The District Court agreed with HGSI, and denied VVL permission so to amend its Complaint.[34] VVL has not contested the Court's refusal to allow the amendment. This forecloses what VVL seeks here.

G. VVL's Argument for Rescission Similarly Fails

VVL argues that, in the summary judgment proceeding, the District Court acknowledged that "a substantial portion of the merchantable Virginian vermiculite reserves is foreclosed" by what VVL contends is the Grace-HGSI conspiracy. VVL Brief at 78, citing 108 F.Supp.2d at 588. VVL asks for rescission in the event injunctive relief is not granted. VVL Brief at 78.

But foreclosure of the reserves is irrelevant unless VVL shows that the effect was anticompetitive which it has not done. In any event, a private litigant must have standing -- it must prove at least some sufficient "threatened loss or damage" - - to obtain equitable relief. California v. American Stores, supra, 495 U.S at 296. The trial court found at trial that VVL had not established such a basis. J.A. 970-71. As to VVL's foreclosure point, the District Court declined after trial to find that the alleged "foreclosure" resulted in either harm to competition or injury in fact to VVL, or that it meaningfully threatened either harm to competition or injury in fact. For the same reasons (e.g., ample available reserves) discussed by the District Court (144 F.Supp.2d at 600, J.A. 971) and by HGSI above in

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33 VVL's December 1, 1999 Motion to Amend, with proposed Third Complaint attached, at J.A.2.

34 Order filed April 26, 2000 ("Additionally, the court construes the proposed prayer as a substantive change which would require the court to reopen discovery and would disrupt the current trial schedule").

connection with VVL's related arguments, VVL is not entitled to rescission. VVL has not shown the trial court's findings on this issue to be clearly erroneous.

VVL now asserts that it will have an "opportunity to mine the property" pursuant to the VVL-Grace settlement agreement if rescission is ordered. VVL Brief at 78. But VVL also explains that it is barred from revealing the terms of the VVL-Grace settlement, after it purports to reveal part of those terms. The terms of that settlement are neither public nor known to HGSI. HGSI certainly in no way consented to the unknown terms of the settlement agreement. Tr. Trans. 3 & 4. In the circumstances, the settlement is not part of the record on which any decision on appeal can be based. It is highly inappropriate for VVL to purport to discuss parts of a secret deal in an effort to argue for a particular result on appeal.

In the event HGSI were somehow to be held potentially liable for equitable relief, including rescission, the terms of the VVL-Grace settlement agreement must be disclosed so that its effect and impact may be properly litigated before the District Court. The relevant portion of VVL's brief discussing the settlement terms avails VVL nothing, but should nonetheless be stricken as wholly inappropriate given the secret nature of the settlement.

H. VVL's Prayer for Damages Ignores Proper Set-offs

VVL requests this Court to award damages, before trebling, in the amount of $3,947,014 for alleged past and future transportation costs (but see note 8), and $3,191,823 for lost profits after the year 2012. For the reasons stated by the trial court and by HGSI herein, VVL sustained no injury, and VVL is entitled to no damages. In any event, the trial court did not make findings on HGSI's claims for set-off. These claims relate not only to whatever set-off would be appropriate based on the undisclosed Grace/VVL

settlement, but also to the value of the property in question, which VVL by its own damage calculations concedes is worth vastly in excess of what VVL offered for it.

I. HGSI's Cross Appeal

The issues tendered by HGSI in its cross appeal need only be reached if this Court is otherwise inclined to remand based upon issues raised by VVL. None of the issues raised by HGSI requires reversal of the judgments in HGSI's favor.

1. No Tort or Actionable Wrong Pertinent to VVL May Properly Be Found

VVL claims that the trial court found that a "tort" had been committed. VVL Brief at 28, citing 144 F.Supp.2d 609 (J.A. 977). HGSI does not so read the trial court's findings. If HGSI's reading is in error and the trial court found a tort, then the trial court applied an incorrect legal standard. Although the trial court did find that Grace breached a duty of good faith to the Peers in transferring the former Peers properties to HGSI, this does not amount to any finding of a tort or actionable wrong on which VVL may predicate liability on the part of HGSI to VVL. As HGSI has already pointed out, neither Grace nor HGSI breached any duty or standard of care owed to VVL, and VVL therefore may not maintain a suit under the Virginia. Civil Conspiracy Act against HGSI. See Citizens of Fauquier County, supra.

If, contrary to HGSI's view, the various findings as to the Peers and the issues relating to the Peers are not wholly irrelevant, the District Court's findings that Grace breached a duty to the Peers are nonetheless clearly erroneous,[35] and

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35 It is ironic indeed for HGSI to be faced with defense of claims by plaintiffs who never sued HGSI, especially where the claims are now settled against the defendant (Grace) against whom they were brought, and the relevant plaintiffs (the Peers) and Grace have long since been dismissed.

any legal conclusion that Conspiracy Act liability may be predicated upon those findings is thus also in error. The findings and conclusions on this issue fail to take into account substantial evidence undercutting the conclusion of "bad faith" or are contrary to the evidence as a whole.[36]

The trial court found, elsewhere in its opinion (108 F.Supp.2d at 567-71, J.A. 946-49), that Grace made a good faith effort to sell all its interests in the A.D. and M.F. Peers properties to VVL in 1991, prior to the donation to HGSI. Grace evaluated VVL's initial offer as inadequate. VVL responded with an offer which Grace viewed as a step backward. VVL indicated that its offer was final, and that it intended to pursue other options. The trial court concluded that VVL's own intransigence resulted in a breakdown in the negotiations. Grace controlled the former Peers properties by fee ownership, not via a mining lease. Grace had paid substantial consideration for fee ownership of both these properties, making this situation quite different from a mining lease. Moreover, Grace had absolute discretion whether to mine or not to mine. See note 31. VVL claims to be the only vermiculite resource buyer in Louisa County. Assuming arguendo this to be true, Grace's effort to accommodate VVL (and the Peers) with a sale to VVL, unsuccessful because of VVL's own intransigence, surely discharges Grace from a claim of breaching any duty of "good faith" applicable to Peers here, or at the very least, any breach of duty which VVL may assert against HGSI.

The trial court found that the M.F. Peers testimony was unrefuted that Grace had "promised" him it would mine his property. J.A. 943 at ¶¶ 34 & 43. Respectfully, this ignores substantial evidence, including contemporaneous documents, and is clearly erroneous. Although by the time of trial Grace was out of .the case and supplied no

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[36] See Miller v. Mercy Hosp., Inc., 720 F.2d 356, 361 (4th Cir. 1983) (breach of F. R. Civ. P. 52(a) standard).

witnesses, HGSI designated deposition testimony and exhibits refuting Mr. Peers' self-serving wishful thinking. The unrebutted depositions, including testimony by Mr. Hash (who worked for both Grace and VVL), unequivocally showed that Grace did not believe the M.F. Peers property contained commercially recoverable vermiculite. See note 6. Indeed, Mr. Lyall (in 1972, the head of Grace's vermiculite operations) testified that M.F. Peers "was told that commercially [mining his property] was not viable .... [Grace] saw no reason we would ever mine his property." Lyall Dep. 143:6-9. Accord, Hash 2/15/99 dep. at 117:2-21. The donation of a parcel which Grace owns in fee and does not believe contains any commercial mineral hardly constitutes "bad faith" to the original owner.

Furthermore, with regard to A.D. Peers, Grace's contract indicated that Grace could transfer the former A.D. Peers parcel to any third party, and that in such event, Grace's only obligation would be to resell 37 acres to A.D. Peers for a fixed sum ($36,241) (PTX 50, ¶ 1(C)), which Grace in fact honored prior to donating the former Peers property to HGSI. Stipulations ¶¶ 87-89 (PTX 46 at p.10). The A.D. Peers agreement thus not only explicitly contemplated a sale, but "liquidated" what consideration, if any, Grace owed A.D. Peers if Grace elected to sell rather than mine. In addition, although not required to pay any advance royalty, Grace voluntarily did so to the tune of $50,000. J.A. 944 (1164). In the circumstances, Grace more than complied with whatever good faith duty was owed to the Peers. Given its effort to sell to VVL, Grace simply did not act "in furtherance of its own interest, with intentional disregard to the financial interest of the [Peers]" as would be required to make out a cause of action for bad faith breach of contract in Virginia. See State Farm Mutual Automobile Ins. Co. v. Floyd, 235 Va. 136, 366 S.E.2d 93, 96 (1988)

Certainly nothing which Grace did rendered either of the Peers worse off than if Grace had simply held onto the property, or reserved the mineral rights and transferred it to some other entity for nonmining purposes, which is what the District Court elsewhere found Grace would have done due to VVL's inadequate offer. 144 F.Supp.2d at 599 (J.A. 970, ¶¶ 75-77)

2. The District Court Erred in Granting Summary Judgment Against HGSI's First Amendment and Related Defenses

The District Court granted summary judgment in favor of *V\TL* on several of HGSI's defenses, including (other than for Noerr-Pennington issues) HGSI's defense that its conduct was protected by the First Amendment, and HGSI's defense that its conduct was pursuant to the National Historic Preservation Act, 16 U.S.C. § 470, and agreements with the National Park Service. The District Court also granted summary judgment against HGSI's defense that it was not engaged in commercial activity.

The sole grounds offered by the District Court for summarily dismissing HGSI's defenses was that they were inapplicable to Sherman Act causes of action. See 108 F.Supp.2d at 603, J.A. 627 (non-profits not exempt from Sherman Act); id. at 604, J.A. 628 (restricting First Amendment defense to Noerr-Pennington matters only).

HGSI does not claim that it has an exemption from the Sherman Act solely by reason of HGSI's non-profit status. However, there are cases holding that the Sherman Act is inapplicable to social action activities.[37] In the abstract, acquiring land to preserve a National Historic Landmark, like acquiring land to preserve a National Park, would be viewed as social action, not commercial, because the party acquiring the land for the Park or Landmark is not

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[37] E.g., NOW v. Scheidler, 968 F.2d 612 (7th Cir. 1992), aff'd in part and rev'd in part, 510 U.S. 249 (1994); State of Missouri v. NOW, 620 F.2d 1301 (8th. Cir. 1980).

acting to obtain a commercial gain or profit for itself. On VVL's appeal of the dismissal of HGSI to this Court, this Court found (accepting all allegations in VVL's Complaint as true) that the conduct of HGSI was "commercial" because of allegations that the agreement resulted in an increase in the price of vermiculite (156 F.3d at 541) and because HGSI realized a substantial pecuniary gain from the donation, and further protected the alleged commercial interests of its members and management. Id.

VVL never showed any increase in the price of vermiculite ore (J.A. 603) or vermiculite (J.A. 613) which could be associated with the donation. HGSI presented unrebutted evidence at summary judgment that its management and members did not receive any pecuniary gain from the donation, nor did they protect or enhance any of their commercial interests by reason of the donation.[38] The District Court stated that the donation itself constituted "pecuniary gain," and that HGSI sold some parcels for pecuniary gain. 108 F.Supp.2d at 604. But solicitation and receipt of donations, or use of donations in furtherance of social action goals, has not heretofore been viewed as rendering a donation to an organization, whether a church or entity like HGSI, "commercial."[39]

In FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426, 110, S.Ct. 768, 776-77 (1990), the Supreme Court indicated that First Amendment protection extended to social activism for objectives other than civil rights so long as an objective of the activities did not entail "an economic advantage" that was "special . . . for themselves." Here, the record is unequivocal that the "pecuniary gain" from the Grace donation was used solely for historic

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38 See, e.g., HGSI S.J. Exhibits tabs 2, 20 and 21 (deposition excerpts).

39 DELTA v. Humane Society, 50 F.3d 710 (9th Cir. 1995).

preservation of the environs of the National Historic Landmark. This is a benefit not special to HGSI or its management or its members, but instead is a benefit for the people of the United States.[40] There is no showing of any special economic benefit, in higher pay or higher land value, from this "pecuniary gain" to HGSI members or officers. Indeed, VVL's Mr. Sansom conceded in his deposition[41] (and later at trial, J.A. 819-20) that historic preservation in Green Springs decreased land value. In short, whatever HGSI was obtaining, it was not "pecuniary gain" special to it or its members. Under these circumstances, the appropriate response was not, and is not, to grant summary judgment against HGSI's defenses. Instead, HGSI should have been permitted to offer evidence and defend on these grounds. Accord, H. Hovenkamp, Federal Antitrust Policy 216-17 (West 1994) (antitrust inapplicable if no "special advantage" sought). See also Adidas v. NCAA, 40 F.Supp.2d 1275 (D. Ks. 1999)

In any event, even if the District Court properly held that the defenses were inapplicable to the Sherman Act, the District Court overlooked the fact that VVL also raised a state law claim under the Virginia Civil Conspiracy Act. The First Amendment is unquestionably available as a defense to such state law claims. Indeed, in Potomac Valve & Fitting v. Crawford Fitting, 829 F.2d 1280; 1284 (4th Cir. 1987), this Court recognized that the First Amendment was available as a defense to a Virginia Civil Conspiracy Act claim, as well as to other Virginia state law claims. In Potomac Valve, the Court found that the alleged tortious act (an alleged defamatory statement about a particular product test), underlying an alleged violation of the Virginia Civil Conspiracy Act, was not unlawful because it was protected by the First Amendment. The alleged defamatory statement

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40 See HGSI S.J. exhibit tab 2 (4/14/99 dep at 445).

41 HGSI S.J. exhibit tab 4, Sansom 4/21/99 dep at 136-37 (devalue property by more than 30%).

was not, made to influence government action (i.e., not within Noerr-Pennington), but instead was clearly commercial in character, designed to influence customers to buy defendants' product as opposed to plaintiff's product. See also NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (First Amendment defense against state tort liability for alleged group boycott for social action purposes).

Moreover, as HGSI explained in response to VVL's motion for partial summary judgment, the Historic Sites Act, establishes a federal policy to preserve for public use historic Sites of national significance. 16 U.S.C. § 461. Section 2 of the Act, 16 U.S.C. § 462(e), authorizes cooperative agreements between the United States Department of Interior (National Park Service) and private organizations "to protect, preserve, maintain, or operate any historic site ... or property ... regardless whether the title thereto shall be in the United States." Pursuant thereto, the National Park Service entered into a cooperative agreement with HGSI. The cooperative agreement provided that the National Park Service and HGSI would pursue the donation of conservation easements consistent with preservation of the Green Springs National Historic Landmark. HGSI acted pursuant to this cooperative agreement in acquiring the property which is at issue in this proceeding.

Section 7 of the Historic Sites Act, 16 U.S.C. § 467, provides that the provisions of the Historic Sites Act "shall control if any of them are in conflict with any other Act or Acts relating to the same subject matter." The District Court ignored this entire statute in granting summary judgment against HGSI's Third Defense. Assuming arguendo this is correct as to VVL's Sherman Act ciaims,[42] section 7

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42 But see 16 U.S.C. § 470, et seq. (NHPA), stating a federal policy "to give maximum encouragement to individuals undertaking preservation by private means," and 42 U.S.C. § 4332(1) (NEPA), requiring public laws to be interpreted in accordance with the policies of NEPA.

nonetheless applies to VVL's claim under the Virginia Conspiracy Act where the donation preserves land in and adjacent to Green Springs National. Historic Landmark consistent with a cooperative agreement between HGSI and NPS under the Historic Sites Act. Under 16 U.S.C. § 467, 16 U.S.C. §§ 461 & 462 "shall control." Under the Supremacy Clause of the U.S. Constitution, federal law governs in the event of inconsistency, not the Virginia Civil Conspiracy Act.

In order to establish liability under the VCCA, VVL must prove by clear and convincing evidence that the alleged conspirators acted with malice and without justification. Due to the summary judgment, the trial court erred in ignoring substantial evidence that HGSI acted to protect the National Historic Landmark in its trial findings on VCCA issues.

3. The District Court Erred in Limiting Discovery and Excluding Relevant Evidence

VVL moved in limine to prevent HGSI from presenting to the trier of fact items like Grace drilling records showing that the vermiculite ore located on HGSI's property was contaminated with various forms of asbestos, showing lack of merchantability. VVL contended the evidence would upset the market for VTL's vermiculite and confuse the trier of fact: F. R. Ev. 403 authorizes exclusion bf relevant evidence if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." VVL denied asbestos contamination during discovery (J.A. 861 n.4). Although indications of contamination were in the public domain,[43] VVL evidently feared more disclosure would harm its sales. But the fact that public disclosure of asbestos might prove upsetting to sales, coupled with VVL's own contention that such contamination rendered Grace's Libby operation

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43 E.g., DTX 33 at J.A. 1189-90.

uneconomic (see note 7), illustrates the potent relevancy and substantial probativeness of the evidence (i.e., that it damages VVL's case), not that it is prejudicial. See Wright & Graham, 22 Federal Practice & Procedure § 5215 at 274 (1978)

Although the District Court acknowledged that the evidence was potentially relevant, the District Court granted VVL's motion on the theory that asbestos contamination influences marketability due to health effects, the evidence thus suggests health hazards, and this was "confusing" and prejudicial; under F. R. Ev. 403. J.A. 673 ¶2; J.A. 647-50 (mem. op.). The District Court also restricted HGSI's discovery on the subject, granting VVL's motion to quash portions of an HGSI subpoena, again as prejudicial. J.A. at 727-33. Evidence is unfairly prejudicial only when it would overwhelm the logic of the trier of fact (Wright & Graham at 278), and that is not credible here.

This issue is hardly academic. After trial, the District Court belatedly admitted into the record a federal agency letter with attached reports and data indicating the presence of asbestos contamination in the VVL ore. J.A. 868, 875, 876 & 933. In the event of a remand, HGSI must be permitted to discover and to introduce relevant evidence on asbestos contamination.

HGSI also sought to present expert economics testimony on the nature of market power and anticompetitive effects. The trial court refused to hear such testimony on the theory that summary judgment (i) had disposed of all economics issues, and (ii) had rejected HGSI's contention that market and market power were germane on conspiracy to monopolize under Sherman § 2. J.A. 821-57. VVL does not challenge judgment for HGSI on Sherman § 2, so the court's second ground is moot. However, the evidence remains germane on the question of antitrust injury, in the event of a remand on Sherman § 1.

4. The District Court Erred in Failing to Consider Certain Expert Evidence Presented by HGSI under Rule 56(e)

In considering issues relating to the definition of an antitrust relevant market at summary judgment, the District Court ignored evidence presented by HGSI that VVL's proposed relevant market -- vermiculite mining rights in Louisa County-fails because it does not account for substitute uses of land. See 108 F.Supp.2d at 578 n.19, J.A. 607. HGSI's expert economist, Professor David Mills, testified in the Daubert hearing that preservation competes with mining as an alternative use for land in and adjacent to the Landmark.[44] He confirmed this position in an affidavit, in which he noted that "[v]ermiculite mining rights are indispensable for some non-mining land uses for the simple reason that those uses are mutually exclusive with vermiculite mining." The District Court, citing M & M Med. Supplies, supra, 981 F.2d at 164 & 166, asserted that the Mills affidavit on this point stated insufficient facts and thus would be ignored under Rule 56(e). Professor Mills affidavit, however, Comports with the M & M case. It does not rely on general economic theory. It states the basis for the conclusion that other land uses must be considered as part of the relevant market: namely, that vermiculite mining rights are indispensable for some non-mining uses. "[Am affidavit that states facts on which the expert bases an opinion satisfies Fed. R. Civ. P. 56(e) even though the expert

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[44] The District Court characterized Professor Mills as testifying that a hypothetical monopolist could not price mining rights above competitive levels because of competition with preservational uses. 108 F.Supp.2d at 578, J.A. 607. Respectfully, Professor Mills did not so testify. Professor Mills instead indicated that the market value of land inside a National Historic Landmark does not reflect "externalities," that is, values to society at large. Mills Aff. ¶¶ 26-27, J.A. 409. In other words, he indicated that the value of the land for non-mining purposes may be greater than its market value, including its market value for mining purposes, or, put another way, that the highest and best use for the property maybe for purposes other than vermiculite mining.

does not attach data supporting the facts." 981 F.2d at 166. The Fourth Circuit indicated that the data underlying the facts can be obtained in other ways. Id.

Conclusion

The judgments of the District Court in favor of HGSI should be affirmed.

Respectfully submitted,

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Reply Brief
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Virginia Vermiculite, Ltd., (VVL), in its Reply and Answering Brief ("VVL Rep. Br."), neither refutes the arguments presented by The Historic Green Springs (HGSI), nor otherwise establishes any basis to reverse the judgment by the District Court in favor of HGSI. Pursuant to the applicable scheduling order, HGSI understands that it is limited in this Reply to addressing issues raised by VVL's position as it pertains to HGSI's cross appeal. HGSI's failure to address VVL's other arguments should therefore in no way be construed as an admission or concession; to the contrary, VVL's various contentions lack merit.

I. HGSI's Cross Appeal Is Proper

VVL seeks dismissal of HGSI's cross appeal, contending that HGSI is not aggrieved by the judgment of the District Court and accordingly "cannot appeal from it." VVL Rep. Br. at 30. VVL's argument misstates the law. The law is succinctly stated as follows: "an appellee is not precluded from filing a notice of appeal even if the judgment below is entirely favorable because of the risk that cross-appellants may become aggrieved upon reversal on direct appeal." St. John v. United States, 931 F.2d 232, 233 n.1 (9th Cir. 1991). If this Court were to reverse on the basis of VVL's appeal, HGSI without question would be aggrieved as to 'the issues on which it has cross-appealed. VVL does not make any claim, and certainly attempts no showing, to the contrary.

VVL relies most heavily on HCA Health Services of Virginia v. Metropolitan Life Insurance Company, 957 F.2d 120 (4th Cir. 1992), for the proposition that HGSI lacks standing to cross appeal. HCA Health Services supports HGSI's standing. In HCA Health Services, the appellants

moved to withdraw their appeal two days before oral argument. The appellee, which had cross-appealed, contested the motion. This Court correctly stated that "[g]enerally a prevailing party is not aggrieved by [a] judgment [in its favor], and may not appeal on the ground that the trial court based its decision on a reason other than the one the party may have wished. 957 F.2d at 123. However, this Court also recognized that a cross-appeal might properly be taken on issues subordinate to the judgment on the merits "so long as [the] party [taking the cross appeal) retains a stake in the appeal satisfying the requirements of Art. III." Id.

This Court elaborated that an appellee which prevailed in the lower court might 'properly pursue' a cross appeal if it were still aggrieved "in its relationship with the parties to this case [] or with respect to any other potential future litigant." Id. More specifically, this Court noted that a party which prevailed in a lower court is permitted to appeal adverse determinations "because of res judicata injury to its future rights." 957 F.2d at 124, citing Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242, 59 S.Ct. 860, .861 (1939); Department of Defense, Office of Dependent Sch. v. FLRA, 879 F.2d 1220, 1221-22 (4th Cir. 1989); TranSouth Fin. Corp. v. Johanson, 931 F.2d 1505, 1506-07 n.2 (11th Cir. 1991); International Bhd. of Elec. Workers v: ICC,. 862 F.2d 330, 334 (D.C. Cir. 1988).

If this Court reverses the judgment below in response to VVL's direct appeal, then the adverse determinations HGSI appeals will be treated as law of the case, tantamount to res judicata, unless vacated or reversed by this Court. At the very least, VVL will so argue below. This result without question would be injurious to HGSI's future rights. This is exactly the reason cross appeals are permitted, even if the judgment below is entirely favorable, as noted in St. John v. United States, supra.

If this Court does not reverse the judgment of the District Court in response to VVL's direct appeal, then the risk to HGSI from future litigation in this case goes away, and HGSI's protective cross-appeal need not be. addressed. At that point, it may be dismissed as moot, not on grounds of lack of jurisdiction ab. initio. In short, until the judgment below is affirmed, HGSI's cross appeal is proper "because of the risk that cross-appellants may become aggrieved upon reversal, on direct appeal." Id., 931 F.2d at 233 n.1.

Of course, this Court may affirm the judgment of the District Court below on any ground, and is not limited to the grounds presented by the lower court. Some of the arguments presented on some issues in HGSI's cross-appeal also constitute alternative grounds to uphold the judgment of the District Court in favor of HGSI. Justice as well as judicial efficiency require consideration of alternative arguments in this situation.

II. No Tort or Other Actionable Wrong Relevant to VVL May Properly Be Found

HGSI contends that the trial court erred to the extent that it appeared to find that VVL had established certain elements necessary for a violation of the Virginia Civil Conspiracy Act (VCCA), Va. Code § 18.2-499 & 500. In its answering brief, VVL contends that the trial court properly found all the elements for a violation of the VCCA, except for injury (causation). VVL Reply and Answering Brief at 33.

A. The Trial Court Properly Found No Causation

HGSI agrees with VVL that the trial court unquestionably found no causation (injury). VVL appears to have abandoned its claims (i) that this Court has

determined as law of the case that it need not show causation and (ii) that the trial court committed legal error on causation. Indeed, VVL appears to acknowledge (VVL Rep. Br. at 13, discussing 156 F.3d at 539) that the relevant causation question is whether Grace would have transferred the properties to VVL absent the donation, in order to establish either antitrust or VCCA liability.

VVL's only remaining argument is that the trial court's findings on the causation issue were clearly erroneous under F.R.C.P. 52(a). The trial court found that Grace would have kept control of the mining rights absent the donation to HGSI, or in any event would have disposed of the properties in a fashion other than to VVL.[1] The property in question has good frontage on a major road in a National Historic Landmark, and is hardly in the middle of the. Sahara Desert. There were unquestionably 'other potential' "markets" for such real estate other than VVL and apart from HGSI.[2] In addition, the trial court found that Grace had legitimate reasons not to sell the property to VVL.[3] This was especially the case since, as the trial court found, Grace had offered the property to VVL, but that VVL had bid an amount Grace deemed inadequate, which amount VVL reduced rather than increased when so advised by Grace. The trial court found that VVL's own low bidding was the reason it did not acquire the property.[4]

VVL contends that a "rational" Grace should have accepted only a few hundred thousand dollars. VVL in effect assumes without basis that it has monopsony power and can dictate terms of sale inside the Landmark. But

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1 HGSI Opening Brief at 47-48, citing 144 F.Supp.2d at 599 ¶¶76-77.

2 E.g., DTX 104 & 105.

3 144 F.Supp.2d at 599 (J.A. 970, ¶75).

4 144 F.Supp.2d at 571 (J.A. 949, ¶132-33).

Grace was not under a duty to make a distress sale. Absent distress, the value of property is at least the value to the buyer and alternative buyers, not the minimum worth to the current holder given the buyer's evaluation of the holder's carrying costs. VVL's own plant manager (Gumble) admitted that VVL should have bid more not less.[5] VVL does not even come close to meeting the F.R.C.P. 52(a) standard to reverse the causation findings.

B. VVL and the Trial Court Err at law on the Requirements for VCCA Liability and Any Findings in Support of Such Liability Fail under F.R.C.P. 52(a)

VVL claims that the trial court properly found all the other elements to a VCCA offense. To the extent the trial court so found, it either misconstrued applicable state law, requiring reversal under the applicable de novo review standard,[6] or overlooked (by the trial court's own admission[7]) key evidence, requiring reversal under Rule 52 (a).

1. Elements of a VCCA Offense

VVL reads the trial court to claim that the elements of a VCCA of tense under Va. Code 18.2-500 are simply (a) two or more people or entities conspiring together (b) to harm a "business" (c) "by any means whatever," VVL Rep. Br. at 18, citing Va. Code 18.2-499. In particular, the only "unlawful act" required to make out a violation of the

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5 Tr.Trans. 361:4 et seq.; see also Gumble 12/12/97 Dep. at 405:19.

6 Salve Regina College v. Russell, 499 U.S. 225, 231, 111 S.Ct. 1217, 1221 (1991) (trial court's construction of state law is subject to de novo review.)

7 As noted in HGSI's Opening Brief, the trial court stated that Peers' testimony was "unrefuted," and made a series of findings based thereon. 144 F.Supp.2d at 563, J.A. 943, at ¶34, et seq. HGSI thoroughly refuted Peers through designations of deposition excerpts and associated contemporaneous exhibits at close of trial. The trial court's own language thus constitutes an admission that key evidence was overlooked.

VCCA is "simply violation of [VCCA itself], misdemeanor conspiracy against another's business." VVL Rep. Br. at 19.

Under this sweeping construction, the members of any conservation or preservation group who combine for the purpose of advocating donation of property or other preservation of land or habitat, or to effect any limitation on "commercial" activity, would ipso facto be liable for treble damages or injunctive relief under the VCCA if their advocacy harmed a "business." By rendering all such activity tortious, the statute would chill and destroy most group-based social action in Virginia, other than government-directed advocacy protected by the Noerr-Pennington doctrine.

VVL, and the trial court, could not be deeper in legal error. To cut to the chase, the Virginia Supreme Court and this Court have rejected any such construction. In Hechler Chevrolet, Inc. v. General Motors, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985), the Virginia Supreme Court ruled that plaintiffs under the VCCA must show that defendants "combined to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal, or unlawful, by criminal or unlawful means" for any Virginia civil conspiracy claim, under, the VCCA or at common law. In Potomac Valve & Fitting v. Crawford Fitting, 829 F.2d 1280, 1284 (4th Cir. 1987), this Court, citing Hechler, supra, explained that,

> "Although the statute refers to 'any means whatever,' Virginia courts have consistently ruled that to recover damages for conspiracy a plaintiff must show that the defendants have combined 'to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not itself criminal or unlawful, by criminal or unlawful means'."

This comports with the interpretation of civil conspiracy

statutes generally. See, e.g., Beck v. Prupis, 120 S.Ct. 1608, 1614 (2000) ("[b]y the time of RICO's enactment in 1970, it was widely accepted that a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious").

2. Errors at Law and Failure to Prove Any Underlying Actionable Wrong

In the alternative, VVL suggests that there was an independent unlawful act properly found by the trial court on which VCCA liability might be predicated.

VVL's first stab on this front is to make the bizarre claim that HGSI "admits" that Grace breached a duty of good faith to A.D. Peers. VVL Rep. Br. at 34, citing HGSI Opening Br. at 65. HGSI "admits" nothing of the sort. Indeed, a major thrust of "HGSI's cross appeal is to contest any, findings of breach of duty to the Peers. On the very page of HGSI's brief cited by VVL, HGSI expressly contends that any findings of breach of a duty of good faith "are ... clearly erroneous," "contrary to the evidence as a whole," and "fail to take into account substantial evidence undercutting [any] conclusion of 'bad faith'," any one of which justifies reversal under F.R.C.P. 52(a). Miller v. Mercy Hosp., 720 F.2d 356, 361 (4th Cir. 1983).

As should be clear from HGSI's Opening Brief, HGSI contends that, to the extent the trial court purported to find a breach of duty, the trial court not only applied an incorrect legal standard, but also failed to take into account substantial evidence. Since Grace had settled on the eve of trial, HGSI necessarily relied on designations from VVL depositions of Grace witnesses, and associated exhibits for purposes of its defense on VVL's contentions that Grace acted in "bad faith." The trial court by its own statements (see note 7) shows that it overlooked a host of excerpts from VVL depositions of Grace personnel designated by HGSI in

the absence of Grace witnesses, as well as related exhibits, justifying reversal under Rule 52(a).

Somewhat inconsistently, VVL in the end acknowledges (VVL Rep. Br. at 35-36) that HGSI disputes the trial court's findings that Grace breached a duty of good faith when it donated the Peers properties to HGSI. VVL does not dispute HGSI's showing (note 7) that the trial court overlooked key evidence in respect to M.F. Peers; namely, that Grace never viewed the M.F. Peers property as having any, commercially recoverable vermiculite, and expressly so informed Peers.[8] It hardly breaches a duty of good faith to M.F. Peers if Grace, which otherwise owned the M.F. Peers property in fee, transferred the property to a, third party for nonmining purposes when Grace never believed the M.F. Peers property contained any commercially recoverable vermiculite and indeed never acquired the property for mining in the first place. See note 8.

The agreement between A.D. Peers and Grace specifically provided that Grace could sell the former A.D. Peers property without mining it, and stated exactly what consideration would flow to A.D. Peers in that event: namely, A.D. Peers would have an option to buy back "Parcel A" for a stated sum prior to such sale. PTX 50, ¶1C. VVL has stipulated that Grace honored this provision: in particular, VVL has stipulated that Grace gave A.D. Peers notice on October 18, 1993 that it was donating the former A.D. Peers property to HGSI, which notice triggered the Peers buy back option. PTX 46 ¶87 (stipulation). VVL further stipulated that A.D. Peers "chose to exercise their right to buy back Parcel A" and by deed dated January 25, 1994, "Grace conveyed Parcel A back to A.D. Peers." PTX 46, ¶89. A.D. Peers executed a release of claims against Grace at that time. Grace S.J. Exh. 16. Grace then conveyed

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8 See HGSI Op. Br. at: 6 n.6 & 66-67 (summarizes key excerpts and exhibits overlooked by trial court).

the remainder of the former A.D. Peers property to HGSI. In short, Grace clearly complied with its agreement with A.D. Peers. To claim otherwise amounts to re-writing the contract in violation of the allocation of risks and remedies mutually agreed therein.

VVL does not (and for the reasons above, cannot) claim that the donation per se violated any duty to A.D. Peers: VVL instead claims only that the trial court properly found "bad faith" in that A.D. Peers wrote Grace on October 16, 1992 giving notice of his wish to exercise the buy back right, but Grace (per a letter by Mr. Poling, a Grace employee) indicated that it had not yet made up its mind. See VVL Rep. Br. at 35-36. VVL basically charges that the "misrepresentation" and one year of, delay constitutes "bad faith" and sufficient evidence to uphold the trial court's findings.

This claim conflicts with unequivocal evidence. According to VVL's own plant manager (Gumble), Grace's Poling spoke with Gumble in September 1992 – one month before the Peers letter. Poling asked Gumble if VVL had reconsidered its offer for the Grace property. Gumble responded in the negative, but indicated that the "upcoming hearings would indicate if [Grace's] property had any value other than 'farmland.'" PTX 12, Tr. Trans. 357.[9] When VVL questioned Mr. Poling at his deposition on his response to Mr. Peers' October 1992 letter, Poling explained that he was hopeful that VVL might be willing to offer Grace more money for the A.D. Peers property depending on the outcome of then-pending hearings on these matters. A delay (which VVL's Gumble seemed to invite) to see if events might turn out such that VVL would offer more money to Grace for the A.D. Peers property (in the words of

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[9] According to Mr. Gumble, Poling responded that farmland value is all that VVL had offered, a point which Gumble did not dispute, and has never disputed.

Poling, that someone "would pay us the value"[10]) is hardly bad faith to A.D. Peers, for the possible outcome would be VVL mining of the property which VVL presumably thinks would be manifest "good faith."

Another factor, set forth in unrefuted evidence also totally overlooked by the trial court, was also at work. Grace's witness Favorito explained that HGSI sought an opportunity to buy out A.D. Peers' option to re-acquire Parcel A,[11] and requested a delay in the transfer of the Peers property to HGSI so as to allow time to raise money and to arrange negotiations.[12] Consonant therewith; Grace's Mr. Poling sent a letter (overlooked by VVL and the trial court) to A.D. Peers dated March 12, 1993 (DTX 153) indicating that Grace wished to negotiate a buy out of the buy back option. The March letter (overlooked by the trial court) certainly served to correct any "misrepresentation" (assuming contrary to the, evidence there was one), and it also assured A.D. Peers that he would be able to exercise his buy out prior to any transfer to a third party.

But more important, even though the effort to negotiate a buy out proved fruitless, the relatively brief delay associated therewith was in the interest of A.D. Peers: If HGSI could raise sufficient funds to outbid VVL, then A.D. Peers would have been better off. An action consistent with higher compensation for A.D. Peers hardly constitutes breach of a duty of good faith to A.D. Peers. This is especially the case since W.R. Grace was voluntarily paying

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10 Poling 8/18/998 Dep. 106:21.

11 Parcel A contained a house listed on the National Register of Historic Places (T.T. 1966), which the National Park Service sought to protect. See, e.g., DTX 119 at p.3, 2d ¶ (NPS letter noting concerns).

12 Eg, Favorito Dep. ,at 142:5 et seq (esp. 148:9-149:18 & 163:18-24). The Grace deposition excerpts are corroborated by contemporaneous HGSI board meeting notes: PTX 102, p.2 (Jan. 93 board meeting).

A.D. Peers $5000/year in advance royalties under an agreement[13] that made such payments fully discretionary on the part of Grace. As VVL stipulated, Grace made a total of $50,000 in these voluntary payments. PTX 46 at ¶38. This action exceeded any financial obligations Grace had to A.D. Peers and, although ignored by VVL and the trial court, further eviscerates any finding of bad faith.[14]

In Virginia, the test for contractual good faith is whether Grace acted "in furtherance of its own interest, with intentional disregard to the financial interest to the [Peers]." State Farm Mutual Automobile Ins. Co. v. Floyd, 235 Va. 136, 366 S.E.2d 93, 96 (1988). Grace clearly did not violate this standard. To the extent that the trial court found Grace acted in bad faith to the Peers, the trial court either failed to apply the correct legal standard, or totally overlooked, substantial evidence that indicated that Grace was acting consistently with the financial interest of A.D. Peers, especially as defined in the applicable agreements between Peers and Grace. To find bad faith requires a court to re-write the Peers/Grace agreements to impose obligations in contradiction to those in the agreements.

Moreover, each element of a VCCA offense must be proved by "clear and convincing" evidence. Multi-Channel v. Charlottesville Cable, 108 F.3d 522, 536 (4th Cir. 1997). No such finding can be made when substantial relevant evidence has been overlooked or ignored. Findings of bad faith accordingly cannot be sustained.

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13 PTX 52.

14 VVL asserts that A.D. Peers lost the time-value of royalties on Parcel A. But Grace exceeded 'the requirements of its contract by paying $50,000 in advance royalties. PTX 46 ¶38. VVL makes no showing that A.D. Peers "lost" anything, much less more than Grace was voluntarily paying. But VVL's whole point is irrelevant: the key fact is that Grace more than complied with its contractual obligations to Peers dealing with the subject at issue.

In findings quoted at VVL Rep. at 36 (J.A. 964, ¶18), the trial court suggested PTX 340 & 342 indicated that Grace drew benefit from the delay by postponing possible mining of Parcel A by VVL. This hardly constitutes bad faith to Mr. Peers. Grace was not under a duty, contractual or otherwise, to help VVL.

VVL, in its now customary method of rhetorical over-embellishment, claims there is "abundance of factual support for the trial court's conclusion that Grace breached its duty of good faith toward [A.D.] Peers." VVL Rep. Br. at 37. There is not, unless the terms of the agreement between Grace and Peers are ignored and a new one imagined for the parties, especially if the properly designated deposition excerpts are considered rather than lost or forgotten.

Finally, VVL also tries to sweep under the rug the thousand pound gorilla in this case: although VVL insists there was some kind of bad faith to A.D. Peers, the fact remains, that Grace sought to sell the A.D. Peers property, as well as all its other holdings to VVL, long before any donation to HGSI. VVL ignores the trial court's findings that Grace viewed VVL's offers, which VVL's Mr. Sansom elected not to pursue, as inadequate. As HGSI emphasized in our Opening Brief, it is hardly "bad faith" to the Peers when Grace tries to sell the properties to VVL, but VVL responds with inadequate offers. VVL has and makes no response to this argument, nor could it, for at trial, VVL's own plant manager (Gumble) testified that VVL should have offered more.

It amounts to an unconscionable bootstrapping for VVL to purport to rely on "bad faith" to the Peers when the action VVL contends constitutes "bad faith" arose because VVL refused to pay anything close to what Grace viewed the property as worth. This is simply a case of a disgruntled potential purchaser, upset at its own flawed strategy, seeking to win in court what it earlier bungled for itself.

Another way to make this point is one of causation: even if this Court were to view the one year of delay in the exercise of the Peers buy-back as "bad faith," it caused no harm to VVL. VVL not only was an intervening cause of any "harm" resulting from this or any other "bad faith," but also VVL had, sufficient reserves available to it throughout the "delay" so it did not sustain any harm at all.[15] Since the acts that VVL alleges were "unlawful" 'for purposes of predicating VCCA liability caused no harm to VVL, those acts cannot be employed as a predicate for VCCA liability.[16]

This supports HGSI's contention that VVL lacks standing to assert that Grace's alleged breach of duty to the Peers is a "wrong" on which VVL can impose VCCA liability on HGSI.[17] See also Citizens for Fauquier County v. SPR Corp., 37 Va. Cir. 44 (1995); Doe v. Bruton Parish Church, 42 Va. Cir. 467, 483 (1997) (underlying actionable wrong required to make out civil conspiracy, e.g., VCCA, liability in Virginia).

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15 For example, VVL leased Brandy B in April 1992 (PTX 46 ¶63 (stipulation)), which had about 9-1/2 years forward reserves alone. See DTX 24.

16 As the Supreme Court said in Beck v. Prunis, supra, 120 S.Ct. 1608, quoting Adler v. Fenton, 65 U.S. 40.7, 24 How. 407, 410 (1860), the underlying wrong on which civil conspiracy liability is predicated "must be tortious, and there must be consequent damage." See also Beck, 120 S.Ct. at 1615 n.7 (recovery on civil conspiracy limited to damage flowing from the underlying tortious act, not from any overt act associated with the. alleged conspiracy)

17 The Peers made no claim of violation of 'the VCCA against Grace '(or HGSI), nor could they, because they could not meet 'thefl requirement that the alleged conspiracy was directed against their "business." Ironically, VVL attempts to conjure VCCA liability from with respect to the Peers on which the Peers themselves could not rely for purposes of a viable VCCA claim.

3. No Legal Malice

Another essential element for a violation of the VCCA is that .VVL show, by "clear and convincing" evidence, that the alleged conspirators acted, with "legal malice," that is, intentionally and without lawful justification. Simmons v. Miller, 261 Va. 561, 573, 544 S.E.2d 666, 676-77 (2001). Grace attempted to sell all its interests in Louisa County to VVL, but VVL for its own business reasons declined to provide Grace with an offer Grace viewed as adequate. Indeed, VVL decreased its offer, rather than raised it, when advised by Grace that Grace viewed VVL's initial offer as inadequate. Grace, under no duty to assist a competitor, simply turned to another entity, HGSI, which had long expressed interest in the property for different purposes.

The fact that business negotiations are unsuccessful and a seller (here Grace) deals with an alternative buyer does not make out "legal malice" for purposes of the VCCA. Meadow Limited Partnership v. Heritage Savings and Loan, 639 F.Supp. 643, 653 (E.D. 'Va. 1986). See also Peterson v. Cooley, 142 F.3d 181, 188 (4th Cir. 1998) (bank's breaking off negotiations with debtor over notes and sale of notes to third party which sought to profit thereby does not constitute a violation of VCCA). It would be contrary to the record as a whole, or overlook the key evidence showing Grace's effort to sell the properties in question to VVL, to claim that Grace acted maliciously, and without justification in ultimately transferring the property to HGSI. Certainly such evidence undercuts any finding that the evidence was "clear and convincing" as required by the statute.

VVL does not appear to argue that HGSI itself acted maliciously or with an intent to harm VVL. To the contrary, VVL characterizes HGSI as having "a good motive for everything that it did -- the preservation of a Historic Landmark District." VVL Rep. Br. at 35. VVL in particular

states that it "accepts that HGSI was motivated, at least in part by this end." Id. However, VVL argues that this "good motive" is insufficient to "sanction or whitewash HGSI's intent and conspiracy to injure VVL's business and reputation" because this Court on motions to dismiss characterized the transaction between HGSI and Grace as "essentially commercial" for antitrust purposes. Id. citing 156 F.3d at 541.

HGSI will address this Court's quoted statement in another portion of this Reply Brief. For now, we will assume arguendo that the transaction between HGSI and Grace was "essentially commercial." The fact that a transaction is "essentially commercial" in no way means that HGSI's, admitted "good motive" must be ignored for purposes of the VCCA. Either, VVL is arguing that "purpose" is irrelevant, or only "commercial" purposes count, for VCCA purposes. In either event, VVL is wrong. As noted, the VCCA requires proof of "legal malice" – action "without lawful justification." Since Grace's decision to deal with HGSI after concluding that VVL would not or could not pay adequate compensation cannot be deemed to be "without lawful justification." VVL's stated "acceptance" of HGSI's "good motives" amounts to an admission that VVL cannot and did not prove the maliciousness element of a VCCA offense.

Perhaps VVL means to claim that only "commercial" motives count. But even then, HGSI prevails. As explained by HGSI's economics expert, Professor Mills, HGSI served the valid economic purpose of expressing the desire of many consumers for historic preservation in the National Historic Landmark.[18] Expression of such a preference makes HGSI a competitor with VVL (and other land users), for land inside the Landmark. All that happened was Grace

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[18] See HGSI opening and answering brief at 41-42, citing J.A. 408-09 & 212-14 (Mills); J.A. 437 (Goetz); J.A. 1045, (Godek).

dealt with one consumer (HGSI) as opposed to another (VVL). Only one could employ the resource.[19] In short, HGSI has articulated a completely valid "commercial" interest as well as public interest in the transaction. Put another way, the fact (which VVL admits), that HGSI was motivated by a desire to consume the resource for historic preservation is no more "malicious" than VVL's motivation to consume the resource for mining. In any event, V1TL's acceptance that HGSI acted with "good motive" is fatal to VVL's case.

III. The District Court Erred in Granting Summary Judgment Against HGSI's First Amendment and Related Defenses

VVL argues, in essence, that this Court has determined that the antitrust laws are applicable to any

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[19] VVL at another point in its Reply Brief (p. 46) claims that "[c]ommon sense would indicate that mining and preservation are mutually exclusive only if mined lands cannot be restored." This is flatly wrong. Preservation means to preserve from destruction, not to restore after destruction. See Webster's New Collegiate Dictionary 903 (1981). Historic preservation means to prevent an historic site or asset from being destroyed, in contrast to historic restoration, which is to restore something which has not been preserved to a representation of what it was. By definition, mining, and historic preservation, are not consistent if mining results in a need, as it does in the case of pit mining, for "restoration" of the land and structures which have not been preserved. In other words, "common sense" indicates that mining and preservation are mutually exclusive if mined lands must be restored. But wholly apart from "common sense," the relevant federal land manager (National Park Service) has found vermiculite mining in the Green Springs National Historic Landmark to be inconsistent with preservation of the Landmark pursuant to the Mining in the Parks Act. See, e.g., DTX 33 (NPS, Threatened National Landmark Study, Dec. 1979); DTX 99 (NPS, Statement for Management). Based solely on operations of VVL, the Service has found that the historic integrity of the [Green Springs Landmark] "has been destroyed in part (DTX 33 at 47). Destruction of the Landmark may result in its de-designation. 36 C.F.R. § 65.9(b) (1). Even Black's Law Dictionary at 737 (1999) recognizes that historic sites "usu. cannot be altered. . . ."

"commercial transaction" and that the District Court properly granted summary judgment that the donation of property by Grace to HGSI was a "commercial transaction" because (a) the donated land had value, and (b) HGSI realized a pecuniary gain by receiving it and in selling some of the donated parcels. VVL Rep. Br. at 38-39. VVL argues that this Court's reversal of the Rule 12(b)(6) dismissal constitutes law of the case providing the applicable factual findings and legal tests pertinent thereto, even before any facts are presented. HGSI construes the factually-dependent statements by this Court as based upon the then-applicable need to accept as true the allegations in the Complaint, and were not intended to constitute findings of fact without the taking of evidence and, well in advance of discovery, summary judgment proceedings, or trial. Similarly, application of law was limited to what was germane at the dismissal stage.

As the National Trust for Historic Preservation, et al. (NTHP) points out in the Amici Brief herein, the leading authorities indicate that the test for applicability of the antitrust laws is whether

> "'the anititrust defendants are likely to receive direct economic benefit as a result of any reduction in competition in the market in which the target firm or firms operate.' 1A Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 262 (1997) (emphasis added); accord, Federal Trade Commission v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 427 (1990) (Act applicable if the defendants 'stand to profit financially from a lessening of competition' due to the activity in question.)." NTHP Amici Brief at 10.

At summary judgment, HGSI supplied uncontested evidence that its members and officers did not receive any

pecuniary gain or benefit from the donation special to themselves. Any benefit to HGSI as an organization was the same benefit as accrued to the public at large. HGSI also supplied expert economics testimony that a donation of property was not the kind of transaction that on its face would either "further" market power or "obtain" it for Grace, because it involved a relinquishment of control by Grace. Mills affidavit, J.A. 407; Mills expert report, J.A. 1045. In other words, this was not the kind of transaction from which Grace was likely to profit by reason of a lessening of competition. Under Superior Court Trial Lawyers, summary judgment against HGSI was clearly inappropriate. The District Court in focussing on whether the donation had "pecuniary value" applied the wrong legal standard. If "pecuniary value" of the donation is the defining characteristic of a transaction rendering "commercial" for purposes of application of antitrust, then it would be difficult, indeed, impossible, to find a charitable transfer that is not "commercial."

VVL claims that no speech is affected by application of the antitrust laws or VCCA to advocacy of donations of property for historic preservation, or to the donations themselves. VVL Rep. Br. at 40. The crux of historic preservation is advocating the donation of property interests sufficient to preserve historic landmarks, districts, structures, or sites from destruction. Indeed, VVL admits that one of the applicable statutes (the Historic Sites Act, 16 U.S.C. § 461, et seq.) actually "encourages the donation of conservation easements for the preservation of national landmarks." VVL Rep. Br. at 42. VVL is in the awkward position of admitting that federal law encourages exactly what HGSI advocates and what HGSI and Grace did here, namely, preserve a portion of a National Historic Landmark from destruction through a property donation. Imposition of liability for treble damages, injunctions, and attorney fees is a sure way swiftly to silence that which federal law would encourage.

VVL does not dispute that section 7 of the Historic Sites Act, 16 U.S.C. § 467, provides that the provisions, of the Historic Sites Act "shall control if any of them are in conflict with any other Act or Acts relating to the same subject matter." (Emphasis added.) See HGSI Opening Br. at 72. Applying the VCCA or the Sherman Act to extract treble damages from HGSI or to divest HGSI of its property certainly conflicts with what VVL admits (VVL Brief at.35) the Historic Sites Act is intended to do.

VVL's claim here is inherently contradictory. Elsewhere in VVL's Reply and Answering Brief, VVL states that it "accepts" that HGSI had "a good motive for everything that it did -- the preservation of a Historic Landmark District." VVL Rep. Br. at 35. VVL acknowledges that the Historic Sites Act encourages exactly the kind of donation that occurred here. Some content must be given to the many statutes, like the Historic Sites Act, which VVL acknowledges are intended to encourage exactly the kind of donations which VVL seeks to disrupt with treble damages, attorneys' fees, and rescission orders. Summary judgment against any application of the First Amendment and related statutes was clearly inappropriate.

IV. The Court Below Erred in 'Excluding Evidence of Asbestos Contamination and in Curtailing Discovery

The District Court prior to trial refused to permit discovery of asbestos contamination of VVL ore, and excluded from, evidence a host of Grace business records (including drilling reports and laboratory analysis), as well as other documents, indicating that vermiculite ore in land now owned by HGSI, which VVL seeks to mine, is contaminated with asbestos. The effect of the District Court's rulings was drastically to limit discovery and to exclude any evidence of asbestos from the trial.

VVL acknowledges that the District Court concluded that asbestos evidence concerning VVL ore would be relevant as to the issue of transportation damages. VVL Rep. Br. at 43. VVL elsewhere in its Reply Brief (p. 20) claims that it is entitled to such damages. In short, VVL admits relevancy of contamination of its own ore in the event of remand. But VVL seems to imply that the trial court's rulings barring discovery and evidence at trial had nothing to do with VVL ore. The District Court prevented discovery on this issue. It turns out the VVL ore was contaminated. Although discovery was barred, in response to a strange pleading filed by VVL after briefing below, the District Court belatedly accepted into the record Mine Safety and Health Administration (MSHA) test results showing that the VVL ore was contaminated with asbestos, in some instances in excess of 90% asbestos (tremolite or actinolite).[20] In the event of remand, HGSI should be allowed full discovery :on asbestos contamination of VVL ore, and such evidence should be admitted.

HGSI sought to include as evidence Grace drilling reports and lab analysis showing the presence of asbestos in ore on property now owned by HGSI. The District Court had granted summary judgment against VVL's future damages claim (which claim was ostensibly predicated on profits VVL hypothesized it would obtain if allowed to mine the ore on HGSI's property. Since future damages were no longer at issue, the District Court evidently believed the evidence irrelevant because it did not relate to ore that was being transported. VVL, however, seeks to reverse the summary judgment on future damages, in which case such evidence is clearly relevant. In any event, evidence of asbestos contamination of the ore on HGSI property is also clearly relevant on equitable relief sought by VVL. If this proceeding is remanded on any basis (antitrust or VCCA) that might result in liability for future damages or some

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20 20 J.A. 933.

form of divestiture, the presence of asbestos contamination of vermiculite ore on HGSI land is highly relevant.

VVL argues, citing the District Court, that the evidence of contamination of the ore on. HGSI's property. should nonetheless be excluded because the drilling records and reports are from the 1960s and 1970s in some cases by unidentified individuals, and are thus of "questionable reliability." VVL Rep. Br. at 43-44. But the drilling records are all Grace business records, for which F.R.Ev. 803(6) provides admissibility, and in any event, Mr. Hash, who supervised drilling for Grace and who was VVL's first president, could vouch' for their provenance at trial either in person or by deposition. Both Grace and VVL relied on the Grace drilling records to calculate the amount of ore present for purposes of this litigation, including VVL's damage calculations. If the records are sufficiently reliable for that purpose, they should be sufficiently reliable on the presence of asbestos in the ore on HGSI's property as well.

VVL relies in the end on F.R.Ev. 403 for exclusion of the evidence, on the ground of that admission would raise a "danger of unfair prejudice." VVL Brief at 43, due to the suggestion of "health hazards," which the District Court feared would "[in] flame the passions. Of the jury." VVL Brief at 44, citing J.A 650. But this case was not tried to a Jury. It was tried to the District Court, whose passions on the subject demonstrably are under firm control.

The known risk of health hazards from asbestos serves to destroy the commercial value of vermiculite ore contaminated with asbestos, as VITL's putative expert himself acknowledged at the Daubert hearing.[21] Evidence of asbestol contamination is unquestionably relevant on all damage issues. Moreover, it certainly militates against the issuance of equitable relief which might result in the ore

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21 HGSI Opening Br. at 7,n.7.

being mined. Furthermore, it is germane to HGSI's motivation. To suppress, cover up, and exclude evidence of asbestos contamination not only is grossly unfair to HGSI in the event of remand, but also is contrary to the public interest. It risks creation of the same kind of public health disaster and Superfund clean up liability that has occurred at the former Grace vermiculite mining operation in Libby, Montana.[22]

V. The District Court Erred in Declining to Take into Account Alternative Land Uses for Purposes of Evaluating VVL's Showings Concerning Relevant Market

In the event of a remand of the District Court's summary judgment against VVL on Sherman § .l, the question of what constitutes the relevant antitrust product and geographic markets will again be posed. At summary judgment, HGSI, through its expert Professor Mills (who is not only a specialist in industrial organization but also in land economics) presented expert opinion evidence that alternative land uses, like historic preservation, should be considered in determining the relevant market. Professor Mills indicated that this was the case because historic preservation and mining are "mutually exclusive." The District Court indicated that it would not consider this opinion for lack of basis.

In M&M Medical Supplies v. Pleasant Valley Hospital, 981 F.2d 160, 164 (4th Cir. 1992), this Court explained that it was error to fail to consider such testimony, and that the proper response was discovery. VVL suggests that the District Court heard Professor Mills' basis for this opinion at the Daubert hearing. Although Professor Mills testified at the Daubert hearing, the basis of his opinion was not the subject of the Daubert hearing, and he did not testify on that matter. Under M&M, the Daubert hearing is

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[22] E.g., J.A. 882 (mortality from asbestos due to Libby vermiculite mining and milling "40.to 60 times higher than expected").

irrelevant to the exclusion of Professor Mills' opinion at summary judgment.

VVL next argues that "common sense would indicate that mining and preservation are mutually exclusive only if mined lands cannot be restored." VVL Reply and Answering Brief at 46. VVL errs, as apparently did the District Court, in so believing. Historic preservation and mining conflict not only where lands cannot be restored, but where restoration is necessary in order to return the land to its past nature. See note 19. In any event, restoration covenants are of questionable enforceability (e.g., Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962), cert. denied, 375 U.S. 906 (1963)), even if VVL, .a small limited partnership, were to accumulate rather than (as it does) distribute its assets.

VI. Conclusion

This Court should affirm the judgments below in favor of appellee/cross-appellant HGSI. HGSI's notice of appeal is proper. Should this Court affirm, then HGSI's cross appeal may be regarded as moot. However, should ,this Court reverse or vacate and remand any of those judgments, then this Court must reach the issues tendered in HGSI's cross appeal, with relief granted as HGSI advocates.

Respectfully submitted,

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[Excerpts from HGSI's Brief in First 1997 Appeal

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

C.A. 97-1807
consolidated with 97-1698 & 97-1699

VIRGINIA VERMICULITE, LTD.,
Plaintiff-appellant

v.

W.R. GRACE & COMPANY - - CONN.,
and THE HISTORIC GREEN SPRINGS, INC.
Defendants-appellees.

BRIEF FOR DEFENDANT-APPELLEE
THE HISTORIC GREEN SPRINGS, INC.

On Appeal from the United States District Court
For the Western District of Virginia
(Charlottesville Division)

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defendant-appellee

22 September 1997

* * *

III. There Was Insufficient Allegation of Proximate Cause, or Common Design or Intent

As an additional grounds for dismissal applicable to HGSI, the district court properly found no "proximate cause" between the restraint alleged by VVL (namely, the conversation covenants) and an injury. The point is that HGSI unquestionably would decline to permit mining with respect to property it controls regardless of the presence of the covenants. Paragraph 35 of VVL's SAC admits that HGSI's "goal has been and continues to be to eliminate all vermiculite mining throughout Louisa County." Given that admission (as well as VVL's admission of HGSI's charter, SAC ¶ 29), VVL simply cannot maintain that the conservation covenants are relevant to any alleged injury. HGSI's activity with respect to the property in question would be the same whether or not the acquisition instruments contained such a covenant. The alleged restrictions are irrelevant so far as HGSI can tell, except perhaps to assist Grace in validating its "substantial tax benefits" (VVL's term) in accordance with IRS requirements.[23]

VVL now makes an argument it never raised in district court: namely, that the donation itself (the "bare transfer," VVL Brief at 12) was the proximate cause of injury. Judge Michael properly ruled below that he donation itself could not violate Sherman § 1 absent an understanding between Grace and HGSI. But HGSI's actions of soliciting contributions of property, and accepting such contributions, from Grace obviously is consistent with

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[23] The Circuit Court for Louisa County ruled in HGSI v. Brandy Farms, Cir. Ct. Louisa County No. 4872-C, decided Sept. 28, 1983, that the restrictions rendered unenforceable the mining leases which Grace transferred to VVL. The effect of the ruling has been to make those properties available to VVL. Ironically, VVL appears to be resting its case on restrictive clauses which either are having no effect, or having an effect exactly opposite to that implied by VVL.

HGSI's unilateral "goal" alleged in VVL's Complaint, which goal is nothing more than action in support of HGIS's historic preservation purposes. To reiterate, all that has happened, according to VVL's SAC, is that an historic preservation group has received what it sought - - independently - - for twenty years from Grace.

This leads to the following point: VVL failed to demonstrate any agreement on a concerted action for purposes of Sherman § 1.[24] The district court below (J.A. 532-33), relying on a line of manufacturer/distributor cases (e.g., Isaksen v. Vermont Castings, Inc., 825 F. 2d 1158 (7th Cir. 1978)), held that a "common scheme" (in the sense of shared objectives) was not required to implicate Sherman § 1. But the cases on which the district court relied all involved parties between whom a commercial relationship existed. No commercial relationship existed between Grace and HGSI. Suppose Grace donated its vermiculite properties in the Landmark to a recipient such as the National Trust for Historic Preservation (for historic preservation), the National Wildlife Federation (for preservation as wildlife habitat), or a church (for a pastoral youth camp). None of these donations reasonably amounts to a "concerted action" between donor and donee to which Sherman § 1 applies. These situations are no different from that alleged below. In no case is the "agreement" requirement of § 1 satisfied.

* * *

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[24] But "[s]ection 1 of the Sherman Act does not proscribe independent action." Garment District Inc. v. Belk Stores Services, 799 F.2d 905, 910 (4th Cir. 1986), cert. denied, 486 U.S> 1005 (1988). Something more is required than conduct consistent with HGSI's historic preservation objectives - - something showing a "conscious commitment to a common objective to achieve an unlawful objective." Id., 799 F.2d at 908, quoting Monsanto Co. v. Spray-Right, 465 U.S. 752, 768 (1984) (emphasis added). The Fourth Circuit again reaffirmed this requirement in Thompson Everett v. National Cable Advertising, 57 F. 3d 1317, 1324 (1995). VVL has failed to allege anything to show a conscious commitment to achieve an unlawful objective in this case.

(3)

No. 02-1167

Supreme Court, U.S.
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MAR 25 2003
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In The

Supreme Court of the United States

VIRGINIA VERMICULITE, LLC,

Petitioner,

v.

THE HISTORIC GREEN SPRINGS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

This case involves the donation by W.R. Grace & Co. (Grace) of some land in and adjacent to Green Springs National Historic Landmark (a unit of the National Park Service encompassing about 14,000 acres in Louisa County, near Charlottesville, Virginia) to respondent The Historic Green Springs, Inc. (HGSI), a small, § 501(c)(3) non-profit corporation dedicated to preserving the Landmark. Petitioner/plaintiff Virginia Vermiculite, Ltd. (VVL), which wishes to pit-mine the land for a substance called vermiculite, claims that the donation constitutes a conspiracy in violation of § 1 of the Sherman Act, 15 U.S.C. § 1.[1]

VVL, which lost its claims in both the district court and on appeal to the Fourth Circuit, claims that the court of appeals decision below presents two certiorari-worthy questions, based allegedly on conflicts in the circuits. The first question, according to VVL, is whether an appellate court is barred by F.R.A.P. 28 from considering issues and arguments not raised in an appellee's brief. The second question is allegedly whether "noncompete agreements" are "immune from scrutiny" under Sherman Act § 1, 15 U.S.C. § 1, when imposed "unilaterally."

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[1] HGSI is not aware of any other case in which a plaintiff has argued that a gift of land to a non-profit organization for historic preservation or other conservation purpose violates the Sherman Act.

OVERVIEW

The proceedings below present neither question proposed by VVL.[2] HGSI as well as *amici curiae* National Trust for Historic Preservation and Land Trust Alliance (hereinafter *amici* are jointly referred to as "NTHP") argued that the underlying donations did not constitute an antitrust-relevant conspiracy, as part of HGSI's cross-appeal. HGSI also properly pointed out in the briefing that HGSI/NTHP cross-appeal arguments also constituted "alternative grounds" to uphold the district court.

The second question (alleged immunity from Sherman Act scrutiny) is also not posed by the proceedings below. In 1998, the Fourth Circuit reversed a F.R.C.P. 12(b)(6) dismissal of this lawsuit. This 1998 decision certainly exposed to "scrutiny" the question whether the donation of land by W.R. Grace Company (Grace) to defendant (respondent here) HGSI, subject to restrictive covenants, constituted a conspiracy in violation of Sherman Act §§ 1-2. The parties went through extensive discovery, summary judgment proceedings (HGSI prevailed at summary judgment on Sherman Act § 1), and a trial of the Sherman § 2 conspiracy claim (HGSI won this issue at trial, and VVL never appealed its loss). This hardly constitutes "immunity" from "scrutiny."

The Fourth Circuit's 2002 opinion at issue here does not overturn the decision in 1998 by granting some kind of immunity; it merely determines that, after seven years of litigation, petitioner VVL could not produce any competent

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[2] *See* Sup. Ct. Rule 15.2 (obligation to point out misstatements relating to proceedings below).

evidence indicating that there was an antitrust-relevant conspiracy. More particularly, the Fourth Circuit quite properly ruled that Sherman § 1 is intended to reach activity in which parties pool their "resources, rights or economic power" to achieve a restraint of trade. The court of appeals correctly pointed out that VVL, despite ample opportunity, had failed to present any evidence of any such pooling, or that any market power was either created or enhanced. Therefore there was no antitrust-relevant combination. All that happened was that Grace donated some land to HGSI and got a tax deduction. Gift-giving, the Fourth Circuit observed, is generally understood to be unilateral, even though there is a gift-giver and a recipient, and it would be an "odd result for the mere receipt of a gift to be viewed as proof of concerted action" for purposes of Sherman Act § 1 liability, even when the gift is conditioned by the donor. Pet. App. 11a.

Petitioner VVL suggests to this Court that it simply seeks to apply the Rule of Reason under 15 U.S.C. § 1 to the donation. Under the Rule of Reason, a plaintiff bears the burden of showing a market, market power, or anti-competitive effect.[3] After the Fourth Circuit remand in

[3] Under Sherman Act § 1's Rule of Reason, if there is no market power, then an alleged restraint cannot unreasonably restrain trade (i.e., be anti-competitive). Since market power cannot be measured directly, a plaintiff ordinarily has to show that the defendants encompass a substantial market share of a properly defined antitrust relevant market as a surrogate for a showing of market power. *See* H. Hovenkamp, Federal Antitrust Policy 82 (1994). Thus, to show that a defendant has market power, a plaintiff (here VVL) must first establish an antitrust relevant market (including a product market and a geographic market). *See Murrow Furniture v. Thomasville Furniture*, 889 F.2d 524, 528 (4th Cir. 1989).

1998, the district court below did apply the Rule of Reason. The district court found, on summary judgment, that VVL failed to show any market, market power, or anti-competitive effect, and that it therefore had not sustained its burden of proof under the Rule of Reason as necessary to make out a Sherman § 1 claim.

VVL is the party which wishes to avoid antitrust analysis. VVL characterizes a donation for historic preservation as inherently a conspiracy (because it involves a giver and a recipient) involving a "naked restraint." Based on this characterization, VVL claims that it as plaintiff need not show any market, any market power, any anti-competitive effect, or any causation at all. VVL claims that a historic preservation purpose cannot be pro-competitive, so a donation for that purpose can never be justified for purposes of the application of Sherman § 1. VVL thus effectively claims that all it needs to show to prevail under Sherman § 1 is that a donation is for historic preservation. This is not application of the Rule of Reason; to the contrary, it so "abbreviates" the Rule of Reason as to be tantamount to a new *per se* rule of unlawfulness, wrought without any economic foundation or experience. In short, VVL wants this Court to mandate that lower courts must ignore market realities, forget about "demonstrable economic effect," and instead engage in "formalistic line drawing," precisely the elevations of form over substance that the modern opinions of this Court consistently warn against. *E.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 14, 118 S.Ct. 275, 281 (1997), *quoting Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 58-59, 97 S.Ct. 2549, 2562 (1977).

COUNTERSTATEMENT OF THE CASE

VVL seeks review of action by the court of appeals in affirming a summary judgment entered in favor of HGSI on VVL's Sherman § 1 claims, but VVL's statement of the case is not based on the record found at summary judgment. Instead, VVL draws its Statement of the Case from post-trial findings on VVL's Sherman § 2 conspiracy to monopolize claim. *See* VVL Pet. for Cert. at 1-4, citing 144 F.Supp.2d at 562 and *passim*. VVL's Statement of the Case thus fundamentally distorts and confuses the issues by ignoring the relevant findings and evidence. Compounding this problem, VVL's purported recitation of facts is misleading and incorrect, commencing with its claim that only two firms mine and process vermiculite.[4] Because VVL's purported Statement of the Case is based on the wrong district court decision, and fails properly to present the course of the proceeding, HGSI will briefly summarize the relevant facts and the proceedings below.

The Green Springs National Historic Landmark, a unit of the National Park System, encompasses approximately 14,000 acres of land in Louisa County, Virginia. Two Virginia state agencies (the Department of Historic Resources and Virginia Outdoors Foundation ("VOF")) as well as the U.S. Department of Interior (National Park Service) manage conservation easements covering the bulk of the Landmark. The conservation easements applicable

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[4] For example, from the start VVL disregards imports as well as new entrants (108 F.Supp.2d at 555 n.2 (Pet. App. 124a at n.2)), as well as ample evidence at summary judgment that the relevant product market includes many substitutes for vermiculite. All of these factors are obviously highly relevant in antitrust analysis.

in the National Historic Landmark bar industrial development, including mining, and basically seek to preserve the rural and agricultural character of the Landmark.

Some of the land in the northern portion of the Green Springs National Historic Landmark contains a substance known as vermiculite. Vermiculite has a number of uses (*e.g.*, light-weight filler, insulation, plant mixes, fire protection), but there are a variety of economic substitutes (*e.g.*, perlite and other lightweight aggregates, polystyrene, corncobs, and so on) for each significant use, thus contradicting VVL's position that vermiculite is a relevant antitrust market. In the United States, vermiculite is produced primarily in South Carolina, Montana and Virginia. Vermiculite is also readily available from foreign producers, with major exporters including South Africa, Australia, and China. VVL admitted in the proceedings below that it already controls reserves sufficient to supply it through the year 2013 in Virginia alone.

Prior to designation of the Landmark, W.R. Grace & Co. (Grace) in the early 1970's acquired land in what is now the Landmark for purposes of mining vermiculite. At that time, Grace produced several end products that used vermiculite and operated vermiculite mining operations in Montana and South Carolina as well. In the late 1980's, Grace switched to substitutes (primarily polystyrene) for vermiculite in its end products, and its demand for vermiculite accordingly plummeted. Grace closed its major vermiculite operation in Libby, Montana, and also

regarded its assets in the Green Springs National Historic Landmark in Virginia as surplus.[5]

In 1991, Grace attempted to sell all of its holdings in and adjacent to the Landmark to petitioner VVL. Grace was willing to effect such a sale on non-exclusionary terms. Apparently overestimating its bargaining power, VVL declined to make an offer Grace felt was reasonable. When Grace indicated to VVL that VVL's initial offer was not adequate, VVL attached conditions with the effect of lowering its offer, and then sent a letter terminating negotiations.[6]

Vermiculite is mined by open-pit mining methods. The Department of Interior determined pursuant to the Mining in the Parks Act § 9, 16 U.S.C. § 1908, that such mining is inconsistent with the Green Springs National Historic Landmark. The Secretary of Interior requested Grace to "consider the merits of participating in the existing [conservation] easement program" for the protection of the Landmark.

After VVL broke off negotiations with Grace, Grace in 1992 and 1994 donated the land which it held in or adjacent to the Landmark to HGSI. Prior to making the 1992

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[5] VVL claimed that Grace closed its Libby, Montana operations because the vermiculite ore was contaminated with asbestos. The district court below refused to allow discovery of, or evidence concerning, asbestos contamination of the Green Springs, Virginia vermiculite ore, except in a post-trial pleading HGSI filed responding to a VVL submission. Shortly after settling this case, Grace entered an asbestos-related bankruptcy proceeding.

[6] The district court specifically found after trial that the negotiations failed due to VVL's negotiating strategy. Pet. App. 36a at ¶134.

donation, Grace consulted with VOF concerning a possible historic preservation donation. VOF, through its Executive Director, Tyson Van Auken, recommended that the donation include restrictive covenants which, like conservation easements, barred industrial uses, including mining. At summary judgment, Mr. Van Auken supplied an affidavit indicating that he made his recommendation because he felt such covenants were appropriate in order to ensure a tax deduction and were otherwise consistent with gifts for public interest purposes. Grace accordingly included the restrictive covenants in the 1992 donation. The covenants barred mining, and provided that the real estate "shall be used solely for agricultural and residential purposes." 118 F.Supp.2d at 558 (Pet. App. 132a). Such covenants were not included in the 1994 donation. Grace took tax deductions for the donations.

PROCEEDINGS BELOW

In early 1995, VVL brought this litigation against HGSI and Grace, alleging violations of Sherman § 1 (conspiracy in restraint of trade) and Sherman § 2 (in the case of HGSI, conspiracy to monopolize; in the case of Grace, attempt to monopolize and monopolization, as well as conspiracy). VVL also alleged parallel state antitrust violations, and violation of the Virginia Civil Conspiracy Act, Va. Code §§ 18.2-499 & 500.

1. Initial motions to dismiss. Grace and HGSI moved to dismiss under F.R.C.P. 12(b)(6). Insofar as relevant to HGSI, the district court dismissed the suit on the §§ 1 & 2 conspiracy claims on the ground that the Complaint alleged only matters consistent with a gift for

historic preservation, which the district court viewed as unilateral. The lawsuit continued on the Sherman § 2 monopolization count against Grace. In response to VVL's appeal of the dismissal, the Fourth Circuit reversed the dismissal. Pet. App. 241a (156 F.3d 539 (1998)). The Fourth Circuit reasoned that inferences in a Complaint must be taken in favor of the plaintiff on a motion to dismiss. The Fourth Circuit observed that, per the Complaint, the donation allegedly resulted in a curtailment of vermiculite supplies and an increase in the price of vermiculite, that HGSI allegedly obtained a pecuniary gain from the transaction (in the form of hundreds of acres of land), and that its members allegedly benefitted commercially. 156 F.3d at 541 (Pet. App. 250a-251a). Assuming the allegations as true, and drawing all reasonable inferences in VVL's favor (as required on motions to dismiss), the court of appeals viewed the transaction as "fundamentally commercial," and thus subject to antitrust scrutiny even though a gift. The Fourth Circuit accordingly remanded for further proceedings. 156 F.3d at 540 (Pet. App. 249a).

2. Subsequent motions for summary judgment. Upon remand, and after extensive discovery, including numerous fact and expert depositions, Grace and HGSI again moved for summary judgment on all counts. VVL filed a cross motion for summary judgment on its Sherman § 1 claim, and against certain of HGSI's defenses.

Contemporaneously with the motions for summary judgment, HGSI, joined by Grace, moved to exclude the testimony of VVL's purported expert economist, Seth Schwartz, under this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). HGSI and Grace pointed out that Mr. Schwartz was neither an

economist (he was a geological engineer and business associate of VVL's principal), nor did he employ methodology comporting with economic science. After four days of hearings, including testimony from three economics professors (Drs. Mills and Goetz of the University of Virginia for HGSI, and Dr. Hay of Cornell University for Grace), the district court granted the motion to exclude the Schwartz testimony. 98 F.Supp.2d 729 (W.D. Va. 2000).[7]

VVL never appealed the ruling excluding its proposed economics expert. In consequence, VVL had no experts with which to counter the expert affidavits, expert deposition testimony, or, for that matter, the sworn *Daubert* hearing testimony presented by HGSI and Grace.

The defense economics experts explained that the evidence on which VVL relied did not establish, and was insufficient to establish, the existence either of an antitrust-relevant market, or of any anticompetitive effect in any market. In particular, they indicated that there was no evidence of any price increase due to any supply constraint. Significantly, Dr. Mills also provided testimony that a donation of the sort at issue here diluted rather than enhanced or preserved market power, if any, held by Grace.

In addition, HGSI supplied unrebutted evidence that its members drew no commercial benefit from the donation; that the only "pecuniary gain" to HGSI was the kind involved in all charitable gift giving and receiving; and that such "pecuniary gain" had never heretofore been

[7] VVL fails to include this opinion in its Appendix.

viewed as antitrust-relevant. *Accord, DELTA v. Humane Society*, 50 F.3d 710 (9th Cir. 1995). HGSI renewed its argument that only unilateral conduct was involved, and that the transaction insofar as HGSI was involved was not commercial. In short, HGSI supplied unrebutted evidence showing that each assumption made by the court of appeals in 1998 in favor of VVL on the basis of Complaint allegations was incorrect.

VVL cross-moved for summary judgment on the ground that the traditional Rule of Reason was not applicable. Although VVL conceded that there was no *per se* violation of Sherman § 1, VVL urged that the donation must be presumed anticompetitive under an "abbreviated" Rule of Reason because, VVL claimed, the donation was a "naked restraint" on production, and thus presumptively anticompetitive. VVL urged that the presumption was here irrebuttable because the purpose was historic preservation, which VVL asserted could never be procompetitive.[8]

In response to HGSI's contention that the donation was unilateral and non-commercial, VVL claimed that the Fourth Circuit's 1998 ruling foreclosed this contention. VVL ignored the fact that the Fourth Circuit's 1998 ruling was based on acceptance of Complaint allegations as true, as required for motions to dismiss.

3. Summary judgment on Sherman § 1. In *California Dental Ass'n v. FTC*, 526 U.S. 756, 775 n.12, 119 S.Ct. 1604, 1615 n.12 (1999), this Court indicated that

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[8] *See* 108 F.Supp.2d at 571-74 (Pet. App. at 159a-163a, esp. 162a-163a) (district court summary of VVL contention).

a lower court must determine if the effects of an alleged transaction "actually are anticompetitive" before abjuring traditional Rule of Reason analysis in favor of a truncated "quick look" as advocated by VVL here. The district court below was exceptionally well-informed concerning evidence of anticompetitive effects, for it had held four days of *Daubert* hearings on the economic evidence, and was accordingly well aware that there was no competent evidence of any anticompetitive effects flowing from the donation at issue in this case. The district court accordingly rejected the "quick look" doctrine advocated by VVL. 108 F.Supp.2d at 574-75 (Pet. App. 163a-167a).

Under traditional Rule of Reason analysis, the district court found that VVL simply could not bear its burden of proof to establish an antitrust relevant market, market power, or other anticompetitive effects. 108 F.Supp.2d at 575-85 (Pet. App. 167a-184a). Although the district court ruled that an antitrust economics expert is not always required to establish market, market power or anticompetitive effects, the district court noted that "as a practical matter, . . . the plaintiffs' lack of any witness to testify about antitrust economics or to rebut the defendants' economists, proves fatal." 108 F.Supp.2d at 576 n.16 (Pet. App. 170a n.16). The district court explained, among other things, that defendants HGSI and Grace "discharge[d] their summary judgment burden both by pointing out that there is an absence of evidence to support the plaintiffs' proposed product market definition, and by providing their own unrebutted [expert] evidence that negates the plaintiffs' proposed definition." 108 F.Supp.2d at 577 (Pet. App. 171a). The district court accordingly granted summary judgment against VVL on VVL's Sherman § 1 claims.

VVL appealed its loss under Sherman § 1 to the Court of Appeals for the Fourth Circuit. HGSI cross-appealed several of the district court's rulings, including the district court's ruling at summary judgment against HGSI's affirmative defense that HGSI and Grace had not entered into an agreement covered by the Sherman Act.

The Fourth Circuit, exercising *de novo* review, upheld the summary judgment against VVL, but for reasons different from those employed by the district court. The court of appeals held in essence that VVL had failed to produce sufficient evidence of an agreement as opposed to unilateral conduct to survive summary judgment. 307 F.3d 277 (2002) (Pet. App. 1a). VVL petitions for certiorari from this action.

4. Summary judgment on Sherman § 2 monopolization and attempt. To show a monopolization or, attempt to monopolize under Sherman § 2, a plaintiff must show an antitrust-relevant market and market power or, in the case of attempt, something dangerously close. 108 F.Supp.2d at 584 & 588 (Pet. App. 185a and 192a). As the district court ruled, "[w]ithout an expert economist, the plaintiffs have no evidence that the inferences they draw . . . are economically sound." 108 F.Supp.2d at 585 (Pet. App. 187a). In contrast, the defense experts conducted a cross elasticity analysis and concluded that "[t]he existence of a variety of substitutes in a variety of applications indicates that even a hypothetical monopolist supplier of vermiculite would be unable to profitably increase price." 108 F.Supp.2d at 587 (Pet. App. 190a). Because VVL did not and could not carry its burden, the district court granted summary judgment against VVL on its monopolization and attempt to monopolize claims brought against Grace. VVL never appealed this ruling.

5. Trial on Sherman § 2 conspiracy to monopolize. Over HGSI's objection, the district court held that the plaintiff need *not* show an antitrust relevant market or market power for purposes of the one remaining Sherman Act count: Sherman § 2 conspiracy to monopolize. The district court held (erroneously in HGSI's view) that economic showings are irrelevant to a conspiracy-to-monopolize claim, and that plaintiff VVL needed only to show that HGSI was conspiring with Grace to monopolize "any segment" of commerce. *E.g.*, 108 F.Supp.2d at 588-90 (Pet. App. at 194a-95a).

VVL's Sherman § 2 conspiracy to monopolize claim subsequently went to a bench trial. Because Grace settled on the first day of the trial and was dismissed, HGSI was the sole defendant. After two weeks of testimony, the trial court took the case under advisement, ultimately entering judgment in favor of HGSI and against VVL on the Sherman § 2 conspiracy count, and on all remaining Virginia state law counts. 144 F.Supp.2d 558 (2001). The district court found at trial that VVL failed to prove the required specific intent; i.e., that VVL failed to show that Grace and HGSI intended to monopolize any "appreciable part of interstate commerce." 144 F.Supp.2d at 596 (Pet. App. 89a). The district court also found, in any event, that VVL failed to show that the donation by Grace to HGSI caused any antitrust injury, or injury in fact, to VVL. 144 F.Supp.2d at 597-601 (Pet. App. 90a-97a). VVL did not appeal the judgment against its Sherman § 2 conspiracy claim to the Fourth Circuit.

6. Trial on Virginia Conspiracy Act claims. The district court found, after trial, no Virginia Civil Conspiracy Act liability because there was no causation-in-fact proven. VVL appealed this ruling to the court of appeals.

The court of appeals upheld the district court on the ground that there was no underlying tort on which civil conspiracy liability could be predicated as a matter of Virginia state law. 307 F.3d at 284 (Pet. App. 13a). VVL does not petition for review of this ruling here.

ARGUMENT

I. VVL's Proposed Rule 28 Question Is Not Posed by this Case

VVL's primary question tendered to this Court is whether an appellate court is barred by F.R.A.P. 28 from upholding summary judgment in a civil case on a ground allegedly not raised during appellate briefing. VVL Pet. for Cert. at i (question 1); *id.* 6-19. This issue is not presented in this case.

HGSI argued at summary judgment that VVL failed to show any combination or agreement to which the Sherman Act applied. This argument overlapped HGSI's affirmative defense that the Sherman Act was inapplicable to the transaction in question. VVL moved for summary judgment against HGSI's affirmative defense, claiming that HGSI's defense was foreclosed by the Fourth Circuit's earlier 1998 ruling that the VVL Complaint alleged a transaction which was "fundamentally commercial." The district court sided with VVL on this point, granting summary judgment against HGSI. 108 F.Supp.2d at 603-04 (Pet. App. 225a).

VVL, of course, did not appeal this portion of the district court's ruling. However, HGSI addressed the issue in the Fourth Circuit by cross-appealing the summary judgment against our affirmative defense on this point.

HGSI briefed the issue (as appellee and cross-appellant),[9] as did *amici* NTHP, et al.[10] In candor, HGSI presented many independent arguments which would dispose of the case against VVL, and HGSI's treatment of the conspiracy/affirmative defense issue was accordingly and necessarily brief. VVL responded in its Reply and Answering Brief, chiefly by arguing that HGSI should not be permitted to cross-appeal. VVL Reply at 38.[11] In HGSI's final Reply Brief at 4 (Pet. App. 387a), HGSI explained its cross-appeal was entirely proper, but, in any event, HGSI's cross-appeal arguments "also constitute alternative grounds to uphold the judgment of the District Court in favor of HGSI [and] [j]ustice as well as judicial efficiency require consideration of alternative arguments in this situation." HGSI then elaborated on NTHP's argument

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[9] HGSI Op. Brief at 68-70 (Pet. App. 377a-78a).

[10] NTHP pointed out, among other things, that it was Hornbook law that whether an activity falls within the Sherman Act depends on whether the participants derived an economic benefit from a reduction of competition in the market where the target firms operate. NTHP Br. at 10, citing 1A P. Areeda & H. Hovenkamp, Antitrust Law ¶262 (1997). NTHP argued that at summary judgment HGSI supplied unrebutted evidence that it derived no economic benefit as well as unrebutted expert economics testimony indicating that Grace's donation of land containing vermiculite to HGSI was

> "not the kind of activity that on its face would either 'further' market power or 'obtain' it. Rather, the donation represented a relinquishment of control, not an augmentation of market power over the real estate in question."

NTHP Br. at 11, citing Jt. App. 407 (expert economist affidavit); Jt. App. 1045 (expert report). VVL does not set forth the NTHP brief in its Appendix.

[11] VVL does not include its Reply and Answering Brief in its Appendix.

(*see* note 10) on the point. HGSI Reply at 20-22 (Pet. App. 401a-402a).

Since HGSI and its allied *amici* raised the issue of whether the gift giving involved here was antitrust-relevant, and VVL addressed the matter, VVL's claim that the issue was not raised is, to use the vernacular, just another dog that will not hunt. With apologies for mixing metaphors, one is reminded of the old Wendy's television commercial which asked, "[w]here's the beef?"

Even were the question presented here, the alleged conflict between the circuits VVL tries to conjure out of F.R.A.P. 28 lacks merit. F.R.A.P. 28 merely addresses the form and technical requirements for briefs, and does not purport to state limits on appellate review. *See* 16A C. Wright, et al., Federal Practice and Procedure § 3974, p. 490 (1999). Leading commentators have not found such limits. *E.g.*, *id.* § 3974.2 at pp. 523-25. Additionally, F.R.A.P. 40 (which VVL completely ignores in its Petition) affords any party disgruntled with an opinion by a court of appeals an opportunity to advise the court of appeals through a petition for rehearing of "each point of law or fact that the petitioner believes the court has overlooked or misapprehended." Surely the "second bite at the apple" afforded by Rule 40 serves to remedy, and certainly to reduce to acceptable levels, all those mischievous outcomes VVL seems to feel could arise from hypothetically uninformed jurists penning allegedly misguided opinions on matters which learned but highly partisan appellate counsel claims were unbriefed.

Pursuant to F.R.A.P. 40, VVL filed a petition for rehearing (including a petition for rehearing en banc) below. That petition was unanimously denied by the

Fourth Circuit. Two (Circuit Judges Luttig and Williams) of the three members of the 2002 Panel also sat on the 1998 Panel in this proceeding. In these circumstances, it is clear that the Fourth Circuit was very well-acquainted with the case, and with VVL's contentions. After giving VVL seven years to establish a case, the Fourth Circuit simply agreed with HGSI and the district court that all VVL was able to do was produce allegations, assumptions and formalisms, as opposed to evidence. In sum, this case does not pose an issue, manifest a circuit split, or raise an important federal question about F.R.A.P. 28.

II. VVL's Proposed Sherman Act Question Is Not Posed by this Case

VVL's proposed second question is ostensibly whether a "covenant not to compete" attached to a land or lease transfer is "immune" from Sherman Act "scrutiny" when it is "unilaterally imposed" by the original property owner or lessee. VVL Pet. at i. This question is simply not posed by the proceedings below. As made plain in our explanation of the case, the Fourth Circuit in 1998 reversed a dismissal of this case for discovery and further proceedings on whether there was an antitrust-relevant conspiracy. 156 F.3d 539, Pet. App. 241a. This is the opposite of "immunization" from Sherman Act "scrutiny."

The Fourth Circuit's 2002 opinion does not change this equation. The 2002 decision fully acknowledged that a restrictive covenant – or any gift for that matter – *might* pose a Sherman Act problem. The Fourth Circuit, however, also acknowledged that gifts are commonly understood to be unilateral and in fact are unilateral. Thus, to engender Sherman Act liability, the court of appeals held that at

summary judgment, the plaintiff must show that the alleged gift involves some form of pooling or leveraging of antitrust-relevant economic power, at least when, as here, the defendant produces evidence to the contrary. Here, the defendant (HGSI) not only produced evidence to the contrary, but, as the district court found, the plaintiff failed to show any market impacted by the donation at all. Indeed, plaintiff VVL lacked an expert economist to rebut the unanimous defense expert testimony that the evidence failed to show any market, market power, or anticompetitive effect whatsoever. In short, VVL had utterly failed to show a combination or collusive action which caused any antitrust-relevant effect, and basically could not since it lacked any expert to rebut defense expert testimony to the contrary.

VVL argues that the Fourth Circuit erred in "explicitly reject[ing] the lower court's holding that an antitrust conspiracy was proven by HGSI's agreement to accept the land and lease transfers and be subject to the attached restrictive covenants." VVL Pet. at 20. This mischaracterizes what happened below at two levels. First, VVL is wrong in implying the district court found that VVL had "proven" some kind of liability on the part of HGSI. The district court found no § 1 conspiracy at summary judgment and no § 2 conspiracy at trial. Second, if VVL means instead to imply that the Fourth Circuit erred in rejecting the district court's treatment of whether VVL's proof at summary judgment met the "combination" element of a § 1 offense, then VVL is still wrong. The district court (at VVL's urging) had misread the court of appeals' 1998 opinion on the Rule 12(b)(6) dismissal as having determined, in essence, that *any* gift of land qualified as a "conspiracy" because it involved a giver, a recipient, and a thing of value (land). The court of appeals indicated that

this superficial formalism misread its opinion: the plaintiff still must show that there was some kind of combination of the resources or rights of the two parties which affected the competitive process by the time of summary judgment. *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752, 769, 104 S.Ct. 2731, 2740 (1984), upon which the Fourth Circuit relied below (Pet. App. 8a), stresses that economic reality and common sense must be employed in determining whether an alleged "combination" is in fact unilateral, as opposed to a pooling of economic power. In short, *Copperweld* stands in opposition to the sort of formalistic categorizations VVL advocates here in lieu of proof of a combination which enhances or creates economic power.

The Fourth Circuit was thus not overlooking the district court's determinations; instead, the court of appeals was correcting the district court's misapplication of 12(b)(6) dismissal standards to the summary judgment context. On motions to dismiss under 12(b)(6), allegations, assumptions and counsel's conjectures may trump evidentiary reality because the parties have not had an opportunity for discovery, and weight is placed on what might possibly be shown, rather than what in fact is shown, to be the reality. But at summary judgment, under the plain terms of F.R.C.P. 56(e), evidence trumps allegations, assumptions, and the conjectures of VVL's counsel. All the Fourth Circuit did in its 2002 opinion at issue here is say that by the time of summary judgment proceedings, VVL had to produce some evidence; VVL could no longer rely on the bare allegations of its Complaint and the rhetoric of its lawyers when its opponent HGSI presented unrebutted contrary evidence.

Elsewhere in its *certiorari* petition, VVL argues that the restrictive covenants imposed on the portion of the

donation below made in 1992 are "nakedly unreasonable restraints of trade when not ancillary to any procompetitive purpose," that historic preservation can never be procompetitive, that it can never justify an alleged restraint, and that such "'naked' restraints on output . . . warrant summary condemnation." VVL Pet. at 25. Again, this is another iteration of VVL's demand that this Court create a new *per se* rule banning donations or other transfers of assets for historic preservation. Again, VVL is urging formalistic line drawing over economic reality and evidence. This is simply contrary to this Court's ruling in *State Oil Co. v. Khan*, *supra*, and the entire thrust of modern antitrust jurisprudence.

"Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored." *Eastman Kodak v. Image Tech. Servs.*, 504 U.S. 451, 466-67, 112 S.Ct. 2072, 2082 (1992). The Fourth Circuit has generally ruled that it is inappropriate to apply the "quick look" doctrine to abort a Rule of Reason analysis without a full evidentiary hearing to examine the market realities. *See Continental Airlines v. United Airlines*, 277 F.3d 499 (2002). Here the district court already had an extensive (four days) evidentiary hearing on HGSI's *Daubert* motion to exclude VVL's purported economics expert. The *Daubert* hearing underscored the inappropriateness of "quick look" as sought by VVL here. The Fourth Circuit's opinion below merely reflects the need to go beyond empty formalism to examine, at the summary judgment stage, whether a purported "agreement" involves any pooling of power or rights which has any antitrust-relevance at all.

VVL's attempt to conjure up a split in the circuits as to the result below is nonsense. Application of the "naked

restraint" doctrine, as demanded by VVL, has uniformly been rejected in all similar cases dealing with a vertical non-price restraint, which is what VVL alleges here. *E.g.*, *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594-95 (1st Cir. 1993) (abbreviated Rule of Reason only used for horizontal agreements); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 953 F.Supp. 617, 654-55 & n.8 (E.D. Pa. 1997); *Parikh v. Franklin Med. Ctr.*, 940 F.Supp. 395, 401 (D. Mass. 1996).

VVL argues that donations (or presumably sales or any other transfers of land) for historic preservation are "naked" restraints of trade and must be condemned under Sherman § 1 as inevitably and inherently anticompetitive. In economic terms, preservation of resources for historic, cultural or open space purposes is a form of economic output used and enjoyed by virtually all Americans, as reflected by the numerous private and public parks, historically preserved lands, wildlife preserves, ecologically preserved areas, and similar kinds of outdoor recreational and cultural facilities across our country. Thus, in economic terms, preservation of resources in a National Historic Landmark by an organization such as defendant HGSI constitutes the production of a legitimate economic output that both economic science and the antitrust laws value every bit as much as production of vermiculite. In the proceeding below, HGSI supplied unrebutted expert economics testimony that historic preservation was economically legitimate and donations or other transfers for historic preservation were procompetitive.

VVL's new tact of calling the donation below an agreement not to compete, or a noncompete covenant, is simply more misleading categorization by VVL. As the Fourth Circuit recognized, Grace's conditioned donation

does not close off any competitive ability that HGSI had in the absence of the donation. This is in marked contrast to the traditional use of "noncompete covenant" to refer to agreements that do in fact extinguish the ability of at least one party to compete in some relevant market. Here the covenants in question extinguished no competition because HGSI could not be bargaining away something that it never had. Attached to land that Grace already controlled, these covenants served merely to implement lawful purposes of the donor, including, *inter alia*, historic preservation values and what Grace believed was advisable in order to safeguard its tax deduction. Of course, land thus donated to an historic preservation group does not thereafter compete with other land available to the mining industry. Rather than being *ipso facto* anticompetitive, this result simply indicates that, in the competition between two incompatible and equally legitimate end-uses, the non-mining use has won out. Moreover, even after seven years of trying, VVL produced no competent evidence, much less persuasive evidence, that the donation had any discernible impact at all on the competitive process, prices for vermiculite, vermiculite output, or any antitrust-relevant indicia.

VVL claims that under *United States v. Addyston Pipe*, 85 F. 271, 280 (6th Cir. 1898), noncompete covenants are illegal restraints of trade. VVL Pet. at 21. Even if one assumes *arguendo* that the donation below could be categorized as encompassing a noncompete covenant, VVL's rhetoric goes way too far. First, "noncompete" covenants are certainly not always illegal restraints of trade under *Addyston* or anything else. It has long been recognized that ancillary restraints to legitimate objectives are not illegal under Sherman § 1. *See United States*

v. Addyston Pipe & Steel Co., 85 F. at 282, *aff'd*, 175 U.S. 211, 20 S.Ct. 96 (1899). As this Court has recognized, noncompete covenants in the context of transfers of assets are classic ancillary restraints which merely enhance the value of a contract or permit "the enjoyment of [its] fruits." *Business Electronics v. Sharp Electronics*, 485 U.S. 717, 729 n.3, 108 S.Ct. 1515, 1522 n.3 (1988). *See also Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 224 (D.C. Cir. 1986) (ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose).

Restrictive covenants on land and their legal twin, conservation easements, are ordinary and customary means to preserve land for historic preservation/ environmental purposes. They are a classic example of a restraint ancillary to a legitimate purpose. HGSI verified this conclusion in the proceeding below at summary judgment not only by supplying evidence that the Department of Interior encouraged conservation easements in the very National Historic Landmark at issue in this proceeding, but also by an affidavit by VOF's Tyson Van Auken.

VVL says the court of appeals' decision conflicts with *NYNEX v. Discon*, 525 U.S. 128, 119 S.Ct. 493 (1998), where VVL claims this Court held that an agreement between a buyer and the plaintiff's rival constituted "an antitrust conspiracy subject to rule of reason review." Pet. Cert. at 28. There is no conflict. The *NYNEX* district court dismissed the entire Complaint under Rule 12(b)(6). The Second Circuit reversed on the theory that the Complaint stated a cause of action for a *per se* violation of Sherman § 1, and for similar reasons, a violation of Sherman § 2 conspiracy to monopolize. This Court reversed the Second

Circuit on the § 1 claim, and vacated the § 2 claim. This Court declined to rule on whether the Complaint stated a cause of action otherwise because such matters were "outside the questions presented for certiorari." 525 U.S. at 140.[12]

VVL says the decision below conflicts with *Business Electronics v. Sharp*, 485 U.S. 717, 726-27, 108 S.Ct. 1515, 1520-21 (1988). *Sharp* clearly indicates that this Court favors scrutiny of economic realities as opposed to the expansion of *per se* rules and presumptions of illegality which VVL espouses. This Court at 485 U.S. at 726-27 states that there is a presumption in favor of Rule of Reason analysis, and "any departure from that standard must be justified by demonstrable economic effect." But the district court, over VVL's objection, applied the Rule of Reason analysis below. The district court found that VVL did not, and in the face of unrebutted testimony by defense economics experts, could not bear its burden under the Rule of Reason. The court of appeals merely noted that, in the circumstances, VVL failed to show anything other than a unilateral gift with no consequences on commerce whatsoever. The result below is consistent with, and indeed compelled by, *Business Electronics v. Sharp*.

In *Poller v. CBS*, 368 U.S. 464, 82 S.Ct. 486 (1962), also cited by VVL, this Court read the evidence as to

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[12] *NYNEX*, *supra*, suggests that Sherman § 2 conspiracy to monopolize rises or falls with a tandem § 1 Rule of Reason claim, 525 U.S. at 139. HGSI is aware of no case in which a plaintiff irrevocably lost, as VVL irrevocably has lost here, a Sherman § 2 conspiracy to monopolize claim, but prevailed in a Sherman § 1 restraint of trade claim subject to a Rule of Reason analysis.

whether there was a conspiracy as insufficient to sustain a summary judgment. This Court did not hold that an antitrust conspiracy existed but remanded the case for a jury trial because material facts were disputed. In contrast, the district court below found, after a trial, that VVL had failed to prove any conspiracy in violation of Sherman § 2, and that VVL had failed to prove that the donation caused any antitrust injury or harm in fact. As the court of appeals pointed out, VVL simply presented no evidence of a pooling of assets, rights, or market power that constrained the competitive process.

VVL cites a couple of circuit cases which it alleges conflict with the result below because certain allegations were held to "state" an antitrust conspiracy. VVL Pet. at 28-29. Again, VVL's Complaint allegations were held to "state" an antitrust conspiracy here. That was the point of the Fourth Circuit's first opinion (in 1998) below. VVL simply failed to discharge its subsequent burden to present evidence to back up its allegations. That is the point of the Fourth Circuit's most recent opinion (in 2002). There is no conflict.

The Fourth Circuit determined that the very basis for VVL's case was lacking; that VVL did not even show that the "conspiracy" it alleges had any effect on anything commercial – on anything antitrust-relevant. All that was left was a gift for historic preservation and gifts are traditionally viewed as unilateral. VVL lost at summary judgment on its claims that the donation, even if unilateral, somehow violated the antitrust laws. Indeed, any such claim by VVL was untenable after the district court's unappealed *Daubert* ruling.

VVL may now wish it had offered Grace more money for the land rather than cutting its offer and breaking off negotiations in 1991-92. But VVL's own poor business decisions a decade ago do not somehow transmogrify into an antitrust conspiracy when Grace transfers the property to someone else. In the end, VVL could not show that Grace's donation of its land to someone else, instead of selling that land to VVL, was anything more than a unilateral and legitimate business decision with favorable tax consequences. VVL failed to produce competent evidence that the donation was a bargained-for melding of economic power between two entities of any antitrust-relevance.

CONCLUSION

It is time to bring this costly and chimerical crusade against historic preservation to a close. The questions VVL proposes are not presented, and in any event, VVL shows no conflict with the law in other circuits, or with this Court, nor does VVL show an important federal question. The petition for certiorari should be denied.

Respectfully submitted,

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REPLY

BRIEF

(4)

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In The
Supreme Court of the United States

VIRGINIA VERMICULITE, LLC,

Petitioner,

v.

THE HISTORIC GREEN SPRINGS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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FIRST QUESTION PRESENTED

HGSI does not even attempt to address the pervasive circuit conflict demonstrated in the petition on whether an appellate court can decide an issue that was not raised by a party in appellate briefing. HGSI offers no explanation of how the decisions from the First, Third, Fifth, Seventh, Tenth and Eleventh Circuits finding FRAP 28 mandatory (Pet. 8-11) can possibly be reconciled with the cases in the Second, Fourth, Sixth, Eighth, Ninth, Federal and D.C. Circuits finding it discretionary (Pet. 12-15). Indeed, HGSI fails to cite any case *at all* that supports its position on this issue.

As usual, when the law is against a party, it must pound other things. But that should not distract from the implicit confirmation HGSI's brief provides that there is no persuasive rebuttal to the showing of a circuit conflict. Were there any such rebuttal, HGSI would have provided it. Further, the other things that HGSI pounds to try to distract attention from this legal conflict are clearly devoid of merit.

1. HGSI remarkably asserts that it *did* raise the conspiracy issue in its appellate briefing. Opp. 2, 16-17. What makes this claim remarkable is that the pages it cites confirm precisely the opposite. *See* Opp. 16 n.9 & 17 (citing Pet. App. 377a-378a, 401a-402a). Not a single sentence in those cited pages ever raises any argument that VVL failed to show an antitrust conspiracy. To the contrary, those pages raise only HGSI's claim that its conduct was not "commercial" and was therefore outside the Sherman Act and protected by the First Amendment and National Historic Preservation Act. Pet. App. 377a-378a, 401a-402a. That claim had already been rejected in the first Fourth Circuit decision, 156 F.3d at 540-42 & n.2, and in any event was not the ground relied upon by the second Fourth Circuit decision from which review is sought here.

Rather, the latter decision relied solely on the new ground that no antitrust conspiracy existed as a matter of law, and the plain fact is that HGSI never raised such an argument and thus VVL never knew to brief a response to it. Thus, HGSI's citation confirms that the Fourth Circuit decided an issue that was not briefed on appeal.

2. HGSI then contends that its allied amicus raised the conspiracy issue in its amicus brief. Opp. 2, 16. Again, this claim is remarkable because the cited pages show precisely the opposite, that the amicus instead argued HGSI's conduct was financially disinterested and thus within noncommercial conduct and First Amendment exemptions to the Sherman Act. Opp. 16 n.10 (citing amicus brief at 10-11). Since HGSI failed to provide an appendix containing this allegedly relevant briefing, we do so here. *See* Reply App. 1a-3a.

The cited amicus briefing does not contain a single sentence purporting to raise a claim that VVL failed to establish the conspiracy element. *Id.* To the contrary, the lead paragraph of this cited section of the amicus brief makes clear that it is raising only the same noncommercial conduct and First Amendment defenses raised by HGSI. *Id.* Indeed, it makes clear that even HGSI's amicus shared the understanding that this was HGSI's claim on appeal rather than some argument that no conspiracy existed.

Further, HGSI cites no authority for the proposition that an appellate court can decide an issue that was not raised by any party if it was raised by an amicus brief. This proposition conflicts with FRAP 28, which requires that issues and arguments be raised by *the parties* rather than by their amici. Here, HGSI was not only an appellee but filed as a cross-appellant on issues decided adverse to

it. It thus had to conform to the rules applicable to appellants. FRAP 28(a) requires that the "appellant's brief must contain . . . a statement of the issues presented for review" and "appellant's contentions and the reasons for them." It does not state these requirements can be fulfilled by an amicus. Even if HGSI were deemed an appellee for purposes of this rule, FRAP 28(b) requires that "appellee's brief must conform" to those same requirements except that the appellee can dispense with offering a statement of the issues if it is satisfied with the appellant's statement. Here, HGSI did offer its own statement of issues, and it nowhere raised a conspiracy issue. Pet. App. 323a-324a. Even if (contrary to fact) the amicus had raised the conspiracy issue, that cannot cure HGSI's failure to do so.

3. In addition, the underlying factual assertion by HGSI and its allied amicus – that its activities were not commercial because HGSI gained no pecuniary advantage from the transaction – was flatly contradicted by the factual findings of the district court. The district court found:

> Grace documents show that the value of the donated land itself, independent of the mining rights, was $721,000. "[B]y receiving hundreds of acres of land, HGSI . . . realized a substantial 'pecuniary gain,'. . . . " *Id.* The evidence also is undisputed that HGSI sold some of the donated parcels for pecuniary gain. This is sufficient to show the transaction was commercial in nature.

Pet. App. 225a-226a.

Relatedly, and contrary to this Court's rules, HGSI makes many other factual assertions in its "Counterstatement of the Case" without citing to any support in the record at all. Opp. 5-8. Despite HGSI's assertions that it is an innocent nonprofit pursuing purely preservationist goals, Opp. 10-11, what the trial court found based on a detailed record was that HGSI's conduct not only reaped it

pecuniary gains, but was designed to help Grace further its anticompetitive objectives rather than further any preservationist objective held by Grace or HGSI. Pet. 4 (collecting quotes from trial court findings). This is why the HGSI-Grace agreement barred vermiculite mining even on land that could be successfully restored or lay outside the preservation district, and why the agreement was changed to allow any commercial mining other than the vermiculite mining that competed with Grace. *Id.* at 3-4. Although HGSI made the same misrepresentations to the district court that it makes to this Court, this district court stated:

> In its review of the record, the court also has uncovered evidence suggesting – contrary to representations heretofore made by HGSI – that HGSI intends to mine the [donated] Louisa County properties.

Pet. App. 156a. The district court likewise found at trial that HGSI wanted to put some donated property to "commercial/industrial use." Pet. 4.

4. HGSI next miscites a treatise for two propositions that it plainly does not state. HGSI first falsely asserts that the treatise states that FRAP 28 "does not purport to state limits on appellate review." Opp. 17 (citing Wright, et al., Federal Practice and Procedure §3974, p. 490 (1999)). Nothing on that cited treatise page makes any such statement. To the contrary, the treatise goes on to state that "issues that are not raised in the appellant's initial brief . . . will normally not be considered by the court," collecting four pages of decisions so holding. Wright, *supra*, §3974.1, at 501. To be sure, the treatise also notes that "courts will sometimes be quite liberal in passing on issues that arguably were not properly raised," collecting the set of decisions from other circuits so holding. *Id.* at 501-04.

But this merely confirms, not refutes, the existence of the circuit conflict that should be resolved by certiorari review.

HGSI second miscites this treatise for the proposition that "[l]eading commentators have not found any such limits" on appellate review of issues not raised in appellate briefing. Opp. 17 (citing Wright, *supra*, §3974.2, at 523-25). But again nothing on the cited pages supports HGSI's assertion. To the contrary, what the treatise there states is that the appellee's brief must conform to the same requirement's as the appellant's brief, with the exception noted above that an appellee need not include a statement of issues unless it is dissatisfied with appellant's statement of issues. Wright, *supra*, §3974.2, at 523-25. But this exception has no relevance here since HGSI was a cross-appellant, was dissatisfied enough to offer its own statement of issues, and neither HGSI's nor VVL's statement of issues raised any conspiracy issue. Pet. App. 261a, 323a-324a. Nor would this exception excuse HGSI's failure to raise the issue in its argument section.[1]

5. Finally, HGSI argues that FRAP 40's allowance of a petition for rehearing somehow trumps FRAP 28's requirement that issues be raised in appellate briefing. Opp. 17-18. Tellingly, HGSI cannot muster a single authority to support this misguided proposition. And this proposition plainly conflicts with the decisions from the First, Third, Fifth, Seventh, Tenth and Eleventh Circuits finding that FRAP 28 precludes consideration of issues not raised in appellate briefing. Pet. 8-11.

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[1] An appellant must raise an issue both in its statement of issues *and* argument section. FRAP 28(a); Wright, *supra*, §3974.1, at 508. Thus, even where (unlike here) FRAP 28(b) does excuse an appellee from offering a statement of issues, it bars consideration of issues an appellee fails to raise in its argument section.

Nor is the availability of a petition for rehearing relevant as a matter of law or policy. As a legal matter, FRAP 28 imposes a clear mandatory obligation on parties to an appeal to raise any issues they wish an appellate court to consider, and a party is thus entitled not to have an issue adjudicated against it that the opposing party never briefed. Nothing in FRAP 28 suggests its obligations are trumped by FRAP 40. Nor does FRAP 40 anywhere suggest that it overrules FRAP 28. It is a standard canon of construction to read provisions to give them both meaning, not to assume one renders the other meaningless.

As a policy matter, the petition for rehearing is not an adequate substitute for briefing before an appellate decision. The reasons are several. First, a heavy legal presumption operates against a party raising issues through a petition for rehearing. *See, e.g.*, Fourth Circuit Rule 40(a) ("Although petitions for rehearing are filed in a great many cases, few are granted.") Parties are entitled to have issues adjudicated on a level playing field, without the burden of that heavy adverse presumption, and to make that right meaningful they must have an opportunity to brief the issues at a stage where no such adverse presumption applies. Second, even without that legal presumption, petitions for rehearing are inadequate because they come after the fact. The court will have already committed itself (without briefing) to a contrary position, and it is a universal feature of human psychology that it is harder to convince humans of a proposition that requires them to admit they were wrong. Finally, petitions for rehearing are severely limited in length. Indeed, here the petition for rehearing specifically noted that, because of those limits, the conspiracy issue could "only be sketched in the limited space allowed here." *See* Petition for Rehearing at 9. The Fourth Circuit has thus never had adequate briefing of the conspiracy issue, and has indeed only seen a small fraction

of the briefing of that issue that this Court has seen on this petition for certiorari.

In any event, the availability of a petition for rehearing does nothing to rebut the demonstration of a pervasive circuit conflict on how to interpret FRAP 28's requirement that issues be raised in the initial appellate briefing. Accordingly, even if the availability of a petition for rehearing were relevant, its relevance would go only to how this Court should resolve the question presented, not to whether certiorari should be granted.

SECOND QUESTION PRESENTED

HGSI does not offer any rebuttal to the detailed showing made in the petition about why the Fourth Circuit decision on the conspiracy issue conflicts with numerous decisions by this and other Courts. *See* Pet. 21-30. Instead, HGSI tries to evade this issue by repeatedly confusing two distinct antitrust matters: (1) whether a conspiracy exists that triggers substantive review under Sherman Act §1; and (2) whether that substantive review was properly conducted. This petition presents only the first issue. The second issue is not presented, and could not be presented since the Fourth Circuit never ruled on it.

1. HGSI's main argument is that VVL's Sherman Act §1 fails because abbreviated rule of reason review is inappropriate and VVL failed to prove the market power or anticompetitive effects required by full scale rule of reason review. Opp. 18-25. HGSI is wrong on both counts, and if the Court is interested in the reasons why, it is invited to read Pet. App. 282a-313a. But the fact is that those issues are irrelevant at present because the Fourth Circuit never reached the substantive question whether the restraint was unreasonable because it found no

conspiracy. *See* 307 F.3d at 280 ("we do not reach the detailed rule of reason analysis the district court undertook"). Thus, although the substantive reasonableness of the restraint *was* fully briefed to the Fourth Circuit, it was not resolved by that court, and thus could not have been – and was not – raised in the certiorari petition. That issue is accordingly not before this Court. If this Court takes certiorari and holds that a conspiracy existed, then the Fourth Circuit can on remand consider HGSI's arguments that its restraint survives a substantive inquiry into its reasonableness.

2. HGSI's other similarly confused argument is that the Fourth Circuit holding that no conspiracy existed does not immunize the restraint from substantive scrutiny under Sherman Act §1 because *the district court* conducted such a substantive inquiry. Opp. 2-4, 18. This argument ignores the fact that VVL is entitled to – but did not get – *appellate* review of how the district court conducted that substantive inquiry into the reasonableness of the restraint. The Fourth Circuit decision thus did immunize the challenged restraint from that substantive inquiry on appeal. It also held that the district court did not have to reach that substantive inquiry, and that district courts in all future cases involving restrictive covenants imposed on transfers of assets should not engage in any substantive inquiry into reasonableness but should simply hold that no conspiracy exists.

3. HGSI falsely asserts that VVL's argument is that covenants not to compete are "always illegal restraints of trade under *Addyston*." Opp. 23. In fact, the petition repeatedly states precisely the opposite, that noncompete covenants attached to the transfer of assets are agreements that are illegal only if unreasonable. Pet. 22-25. Petitioner's objection is instead that the Fourth Circuit decision made

all such noncompete covenants *legal* per se by deeming them nonagreements.

4. HGSI falsely asserts without any record support that: "The district court found no §1 conspiracy at summary judgment and no §2 conspiracy at trial." Opp. 19. This is an astonishing misstatement since it is so explicitly contradicted by the record. At summary judgment, the district court held: "The plaintiffs produced sufficient evidence to establish the existence of a contract, combination, or conspiracy to restrain trade in violation of § 1 of the Sherman Act." Pet. App. 157a. At trial, the district court held: "The court finds that Grace's and HGSI's actions were not consistent with independent action, and that VVL proved by a preponderance of the evidence that HGSI and Grace acted in concert toward a common goal." *Id.* 80a. What the district court held was that, although a conspiracy was proven, the Sherman Act claims survived substantive review.

5. Finally, HGSI repeatedly asserts that VVL simply failed to present evidence of a conspiracy. Opp. 2-3, 20, 26. Again, this factual assertion by HGSI is plainly contradicted by the record. The district court cited copious amounts of evidence proving a conspiracy under all traditional standards. *See* Pet. App. 76a-80a, 144a-49a, 153a-57a. What this case involves is the Fourth Circuit's imposition of a new legal standard about the *sort* of evidence required to prove a conspiracy.

That new standard requires not only the traditional proof that separate entities acted in concert, but also additional proof (where a restrictive covenant is attached to a transfer of assets) that the receiving party added some resources or market power that was necessary to establish the covenant. Pet. 20-21. In particular, under this standard the Fourth Circuit held irrelevant evidence that

HGSI agreed to accept the assets, abide by the covenants, and pay carrying costs to get the assets. *Id.* To the Fourth Circuit, none of that evidence rebutted its conclusion that imposing a restrictive covenant is a unilateral exercise of the property rights of the transferor of property. *Id.* HGSI offers no rebuttal to VVL's showing that this new legal standard could *never* be met for any restrictive covenant imposed on a transfer of property or business assets, and that the Fourth Circuit decision thus conflicts with numerous precedent by this and other courts. *Id.* 21-30.

CONCLUSION

The petition for writ of certiorari should be granted on both questions presented. Indeed, the conspiracy question is so clear-cut after extensive briefing on this petition by both sides that the Court should consider reversing summarily on that question. *See Palmer v. BRG*, 496 U.S. 934 (1990) (summarily reversing antitrust decision based on the petition briefing where antitrust error of lower court clear). In the alternative, this Court should at least grant, vacate and remand for an explanation of why the Fourth Circuit decided the conspiracy issue without any briefing at all.

Respectfully submitted,

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CITED EXCERPTS FROM NTHP AMICUS BRIEF PAGES 9-11

In addition to setting forth the entirety of the cited pages 10-11, the following sets forth page 9 of the amicus brief because it provides the introductory context:

II. HGSI's CROSS-APPEAL SHOULD BE GRANTED.

The District Court granted summary judgment dismissing HGSI's defense that it was a social action organization attempting to preserve a National Historic Landmark District. In particular, the court rejected HGSI's non-commercial conduct and First Amendment defenses. 108 F. Supp. 2d at 603-604. In the view of *amici*, the District Court's approach was overboard on this issue, exposing a wide range of legitimate social and political activities to unwarranted attack as violations of the Sherman Act.

Although antitrust laws can apply to nonprofit organizations, the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. at 213 n.7. As a corollary, the Supreme Court has made clear that conduct is not rendered "commercial" merely because it has an effect on competition. Although noncommercial activity often has some impact on the competitive marketplace, the Sherman Act was not intended "to serve as comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade." *Allen Bradley Co. v. Local Union No. 3*, 325 U.S.

797, 806 (1945); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140-141 (1961), (court declined to "permit" an extension of the Sherman Act . . . simply because those activities have a commercial impact.); *see also Dedication and Everlasting Love to Animals v. Humane Society*, 50 F.3d 710, 714 (9th Cir. 1995) ("Not every aspect of life in the United States is to be reduced to . . . a single-minded vision of the ubiquity of commerce."); *accord, National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612, 620 (7th Cir. 1992) ("Congress [in the Sherman Act] did not intend to reach every activity that might affect business."). Whether in the context of political activity, as in *Noerr*, or other noncommercial conduct, it is difficult to envision activities that do not have at least arguable commercial effects.

The proper test for whether defendants' activity falls within the scope of the Sherman Act is whether "the antitrust defendants are likely to receive direct economic benefit *as a result of any reduction in competition in the market in which the target firm or firms operate.*" 1A Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 262 (1997) (emphasis added); *accord, Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 427 (1990) (Act applicable if the defendants "stand to profit financially from a lessening of competition" due to the activity in question). At summary judgment, HGSI supplied unrebutted evidence that its officers and members received no compensation, and employed proceeds of donations to preserve the National Historic Landmark in accordance with an agreement with the federal government. As a result, HGSI members and officers received no pecuniary gain

personal to themselves as opposed to the public at large from the activity in question. In other words, HGSI did not obtain or seek "an economic advantage . . . special to [itself]." *Id.* at 426.

As the court found at summary judgment, there was no evidence of any anticompetitive effect or any market power in relevant market. The district court indicated that VVL was unable to satisfy burden of proof in this respect, given the unanimous defense expert testimony to the contrary. *Virginia Vermiculite, Ltd.*, 108 F. Supp. 2d at 578.

HGSI also supplied unrebutted expert evidence that Grace acted without "an economic advantage . . . special to [itself]." *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, 493 U.S. at 426. The donation of real estate involved here was not the kind of activity that on its face would either "further" market power or "obtain" it. Rather, the donation represented a relinquishment of control, not an augmentation of market power over the real estate in question. In short, the. . . .
